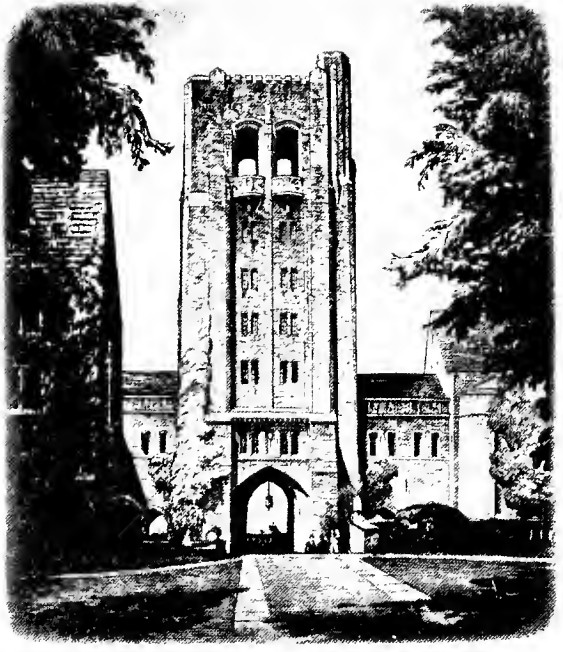

PROSECUTION AND DEFENCE.

PRACTICAL

DIRECTIONS AND FORMS

FOR THE

GRAND-JURY ROOM, TRIAL COURT, AND COURT OF APPEAL IN CRIMINAL CAUSES, WITH FULL CITATIONS OF PRECEDENTS FROM THE REPORTS AND OTHER BOOKS,

AND

A GENERAL INDEX TO THE AUTHOR'S SERIES OF CRIMINAL LAW WORKS.

BY

JOEL PRENTISS BISHOP, LL.D.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1885.

University Press:
John Wilson and Son, Cambridge.

PREFACE.

THIS volume completes my Criminal-law Series. The great undertaking was entered upon thirty-two years ago, and it has been consuming ever since the larger part of an active life of uninterrupted law writing. It consists of the personal examination by one mind of all the sources of the American criminal law, including all the English, Irish, American, and leading Scotch and colonial reported cases, — of reducing the apparently and in some respects actually discordant mass to a system, — of eliminating from the system, not by slurrings over or denials, but by bringing to view and explaining, such ill-formed doctrines and absurdities as the courts can be readily induced to cast off, — and presenting the whole in language as compact, and with as few repetitions, as perspicuity and an exact precision would permit, and otherwise in manner deemed best adapted to practical, every-day use. The finished Series is in six volumes; namely, "Criminal Law," two volumes; Criminal Evidence, Criminal Pleading, and Criminal Practice, combined under the name of "Criminal Procedure," two volumes; "Statutory Crimes," one volume; and the present work, one volume, ending with a "General Index" to the whole.[1] Further and ample expla-

[1] In another view, this series consists of only five volumes. "Statutory Crimes" comprehends the work separately published under the title of "Commentaries on the Written Laws and their Interpretation," meant for civil practice, and of such every-day use and necessity that no practitioner who cares for any of my law writings will be without it. The price of "Statutory Crimes" is but little more than of this work, so that it need not be reckoned in the cost of my Criminal-law Series.

nations of the nature of the work and the manner of its execution are given in three Introductions published in the last editions of "Criminal Law," "Criminal Procedure," and "Marriage and Divorce" respectively.

This volume consists of full and ample "directions" for the various steps in every sort of criminal cause within the range of the reported cases, whether on the common law or on a statute, and whether on behalf of the State or of the defendant, with the needful "forms," and references to the other precedents in the books. The indictments are given in the alphabetical order of the offences, and the citations of the American precedents in the alphabetical order of the States. For the rest of the matter, arranged in chapters preceding and following those containing the indictments, the alphabetical order did not seem practical or best.

Whether this closing instalment of the series should be condensed, as it is, to one volume, or with less labor be made to occupy more expansively two or three, and so bring to me more money and to the profession less profit, was a question settled by a sacrifice which I should be glad to know will be appreciated in my lifetime; but, if this cannot be, I rest content in the certainty of the verdict of the future. All my friends, all the lawyers, whom I consulted, said it was impossible to do otherwise than put the work into not less than two volumes or spoil it. If, now it is finished, gentlemen will do me the favor to look into it and see how in fact it is, they shall receive my hearty thanks. They will discover, that, excluding what by universal consent is of no practical value, this one volume contains more matter in quantity, not speaking of the quality, than all the other books of forms and precedents in the criminal law, English and American, old and new, in however many volumes, combined. I repeat, that this is what one who "looks" will "see." I ask no reader to accept this statement except as the result of his personal examination. Let me suggest for observation the following.

First. Our books of precedents are full of verbosity, by all opinions useless, not retained in the forms in this volume. Few persons are prepared to accept the whole truth on this point,

as to which it can be affirmed only that those who "look" will "see."[1]

Secondly. Our books of precedents are, without exception, largely made up of useless repetitions; a thing which need be said but once being repeated, and again repeated, and thence continually dozens and even hundreds of times. By which means great numbers of pages are consumed with what might more clearly appear, and in a way more convenient for use, on a single half page. One illustration is where verbose counts are multiplied, varying only in such few words as in the present work are introduced, between brackets, into the single form given. Another illustration consists in constant repetitions of such ridiculous surplusage as "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil," "with force and arms," "to the great damage of the said," &c., "to the great displeasure of Almighty God," and immense quantities of other stuff of this sort. Other illustrations will occur to any one who compares our books of precedents in common use with the following pages.

Thirdly. Our books of precedents are almost destitute of references to places in the other books where precedents may be found. The free insertion of such references here has given the reader practical access to nearly five thousand precedents

[1] I present an illustration which, I submit, is not an extreme instance, but simply a fair average. The indictment in Sherban *v.* Commonwealth, 8 Watts, 212, as in substance copied for use into a current book of precedents, is,

That D. S., late, &c. on, &c. at, &c. and within the jurisdiction of this court, did lay a wager and bet with a certain J. C., and that the said D. S. did then and there lay a wager and bet of fifty dollars with the said J. C. that a certain J. R. would be elected governor of the Commonwealth of Pennsylvania at an election to be held in said Commonwealth under the constitution and laws of said Commonwealth, on, &c. the said J. R. then and there being a candidate nominated for public office, to wit, for the office of governor of said Commonwealth; contrary, &c. and against, &c. [*Conclude as in book* I. *chap.* 3.]

The same form, omitting nothing which any pleader would deem important, is, as given post, § 398, but little over half as long; namely, —

That A, &c. on, &c. at, &c. did lay a wager and bet of fifty dollars with one X, that a certain M, who was then and there a candidate nominated for the public office of governor of this State, would, at an election to be held under the constitution and laws of this State, on, &c. be elected governor thereof; against the peace, &c.

This sort of condensation, if there were no other, would almost, perhaps quite, reduce a two volume book to one volume. But I have introduced other condensations also, vastly more effective.

neither printed nor cited in all the other books of precedents combined.

I would not, with this specification, intercept the reader's further looking and seeing. There is more discoverable; and my wish is to stimulate him, not only to examine what is thus indicated, but, uninfluenced by suggestions from me, to pursue for himself the investigation to the end.

By the means thus pointed out, this volume is made harmonious with the other volumes of the series. They, too, are condensed beyond what is common in books on the criminal law. If they seem to occupy large space, it is because of the great dimensions to which our criminal law has grown. Continually, in writing those volumes, I had to struggle with the immensity of the material, and even to reject more or less of what presented strong claims to a place on the written page. But it has been otherwise in preparing this volume. Without any absolute restriction as to its number of pages, and without making it greatly larger than the average, I found room in it for all my material, omitting not even a word deemed important, and compressing nothing to its detriment. True, the reader will sometimes wish to look into books cited, but this is an incident of every text-book.

Though not approving of verbose indictments, I have still furnished to the lovers of verbosity the amplest facilities for spinning the humdrum thread through as long a series of useless allegations, repetitions, and counts as their hearts may desire. The stuff is all given, in approved form, and with the amplest directions for its use. It is even my claim that for this sort of service the book is a great improvement on its more wordy predecessors; for, with it, the pleader will feel a larger freedom than with them in roaming over these marvellous old grounds. To illustrate, the "devil" clause appears here, in its proper place, in various precedents copied in exact words from books in common use. The pleader can thus know its terms and position, and as easily transfer it into every indictment he draws as though it were repeated in every one of these forms. And he will feel more liberty in making amplifications upon it; result-

ing, let us hope, in new and useful views concerning satanic influences, and something valuable added to "science." So the art of multiplying counts uselessly is here explained, and all the help which can be of practical service for doing it is furnished.

For more of the plan of the book, not necessary to be here repeated, the reader is referred to the first chapter, and to the first sub-title of the second.

Nearly all the forms for the indictment, whether on the common law or on a statute, are given in terms to satisfy the common-law requirements as unmodified by statutes. In the few instances where mere statutory forms are inserted, the fact that they are such, and that they are not good at the common law, is distinctly stated. Those of ancient origin are constructed by eliminating from the approved precedents the allegations which the courts have adjudged to be useless; and, where there is doubt of the necessity of an allegation, or otherwise it is in reason useful, it is retained. The rejected allegations are presented once in their several proper connections under each offence; and their uselessness, and the authorities showing it, are pointed out. Since, in the States where statutory forms are provided, the pleader has his choice between them and those of the common law, the forms here given are severally good in every State in the Union, and in the United States Courts, except in the few instances where the contrary is specified. And as the common law is widely abused for its alleged unreasonable requirements regarding the indictment, and because I have a profound sympathy for the wronged, I take pleasure and pride in pointing to the forms in the following pages, and demanding a comparison of them with the statutory ones in "the most favored State" of the Union. Even in mere brevity, they are, as a whole, scarcely inferior; in reason, they are not objectionable for length; and, as furnishing precise pointings-out of the offence charged, they are surpassed by none ever enacted or devised. To this there are simply a very few partial exceptions.

Nor is this conclusion modified by what is mentioned in the text, of the remissness of some of the courts in not excluding from their records disgraceful verbosity and needlessly multi-

plied and complicated counts.[1] Lax judicial habits constitute no part of the law.

The purpose of the directions interspersed with the forms is obvious, requiring no explanation.

The concluding "General Index," opening to one view the contents of the entire series, will save the active practitioner a great deal of time. It was not deemed necessary to consume space with a separate index to the present volume, except to the forms. And all in search of forms should consult that index, not the general one to the series.

In other connections I have mentioned, though with less particularity than desirable, that great impediment to the improvement of our legal literature,—piracy, and the countenance given it by the profession. I include herein, not only technical piracy, but all appropriations by legal writers of the labors of others without the acknowledgment which honesty demands. The evil has been creeping on us for ages, in later years its progress has been enormous, and it has now become so gigantic that it would seem impossible for reform to be longer postponed. The course of reform in nearly all things is uniform, and it is as well known as the path of the sun. An evil grows until earth can endure it no longer. Then from some person or body of persons comes the protest; those who profit from the evil quietly put their hands over the mouths of the people, and their fingers in the ears of those who ought to hear, and for themselves assume the appearance of ignorance alike of the protest and the evil. The protest becomes louder and louder, the very rocks send it through all the air, and the policy of silence is of necessity reversed. Those from whom the protest came are vilified, the entire vocabulary of opprobrious epithets is emptied upon them, falsehood blackens them, and they are even denied a place in decent society. But the morning nevertheless arrives, what was dark is illumined, and the day travels onward to its noon.

In the present instance, reform ought to be possible by other means. Those who profit by piracy in legal literature are comparatively few, and those who are injured by it are not only

[1] Post, § 11–14.

numerous, but they constitute a considerable part of the more educated and enlightened public. If the literature of the law kept step with the mechanic arts in improvement, the practice would be a very different thing from what it is now. And if the same protection were given it by copyright laws and a public sentiment sustaining them which improvements in mechanic arts receive from patent laws and their sustaining public sentiment, the improvements in the one would equal those in the other. In the preface to the seventh edition of "Criminal Law" I briefly pointed out the steps by which the practising lawyers can, if they will, with little trouble and expense, correct the evil and bring the day to our legal literature. An author cannot do it; the work does not belong to me. It is not the proper function of any legal writer, it is for the practising part of the profession. If they will not take up the work, mine must be to give such warning as will prevent others from throwing away their lives in feeding pirates. A good may thus be accomplished indirectly; for even the pirates know that, if honest authorship ceases, their vocation is gone.

The present spectacle is amazing. Our practising lawyers and judges constitute a body of men not surpassed in good qualities by any other in the community. If, as may happen, a lawyer sunk in the depths of wickedness utters a falsehood with every wag of his tongue, if he steals the books from the shelves of his neighbors and claims them as his own, if at night he prowls about with the pads of the burglar on his feet and in the day loads his sideboard and table with plate for which he never paid, he will sigh in vain for any recognition among his professional brethren except what the State's attorney will give him. But let the same man, with the same purpose, fearful of prison bars, turn aside into legal authorship, — let him write his lies in a law book, — let him steal, not printed paper, sheepskin, and plate, but, what is infinitely more valuable and in a just view more to be protected, the illumined jewels and star-gems which were shed with the brain-sweat and brain-blood of honest authorship, — let him put, I repeat, this stolen matter into a law book, mingled, or not, with original gangrene from his own brain,

saying at every sentence, not in words, but by the more effective lie which is implied in the withholding of due acknowledgment, "This is mine," thus making every page bristle with thefts and with falsehoods, then will all the learned judges, from the robed pomp of the highest judicial tribunal of the nation down through the unadorned benches of the State tribunals, listen and bow with profoundest deference to what is quoted from "the learned author," decide cases by it, and honor it by writing or citing it in their opinions. Professors of law will recommend it to pupils, alike for the building up of their understandings, and the *destruction of their morals*. And the legal reviews will stand as guards about the thief to see that no hound pursues him. Is there nothing here for reform? Will those eminent and honored men who thus inconsiderately reach out their hands to sustain the meanest of villains continue their encouragement forever? Will they even join the hunt against those who plead for reform? Until they take this further step, I shall refuse to believe that they will take it. Excellent men often do thoughtlessly, or through neglect to inform themselves of the facts, what on due enlightenment and reflection they would abhor.

As a consequence of this abuse, we hear constant complaints of the quality of our legal literature. Yet the cause is obvious, and so is the remedy. When the ocean is black with pirate-craft, no one wonders that commerce languishes. And if we could imagine a state of things in which, in addition to this, all the people, including the public press, bestowed equal praise, equal rewards in money, and equal protection from the prison and the gallows, upon the mariner who, three days after leaving port, returned with a cargo taken at the cannon's mouth, and him who, after a three years' voyage, brought back a like cargo for which he had honestly paid, it would not require an appeal to science to ascertain why there were so few merchant ships upon the ocean, and the few bore so little of value. The monstrosity of a human skull filled with brains both strong enough to do fit work in legal authorship and weak enough to expend their energies in feeding pirates, thus doing alike to their owner and the public a hundred-fold more harm than good, — sacrificing

a life, not like our Great Exemplar to save the world, but like Satan in his fall to damn it, — is not abundant even in the dime museums.

In view of the condition of things just mentioned, and in view of the further fact that books occupying the sphere of this volume seem hitherto to have been the special delight of the pirates, — in view, in short, of the strong probability that the contents of this volume, which only very great labor could produce, would be pillaged and swallowed, — it was but after a long struggle between inclination and duty, and with deep regrets, that, to satisfy the just expectations of the professional public, I resolved to add this venture to the not unsuccessful ones which have gone before. If it is His Will, without whose leave not even a pirate's sail was ever filled, that this frail bark shall pass through these seas unharmed to the haven beyond, I will thank God, whether man shall also have given occasion for my thanks or not. Nor should I quite despair, even if I did not remember that we have copyright laws, and that, though they need amendment, they are much more effective for the protection of an author than the pirates commonly suppose. The cycles are changing. Captain Kidd could once roam the ocean, murder his victims, rob them, sink their ships; and acquire a wealth for which, in after ages, all the fools would turn out and dig. But that sort of captain has had his day, and the night for him has come. And who knows how near may be the time when Heaven's breath will find its way into the legal profession, and move the hearts of the true and sturdy ones in it to sweep clean the seas of legal authorship, and leave its paths as secure as are the watery ones of commerce in times of peace?

Craving the pardon of any reader who may not understand the necessity of saying in this preface what he disapproves, I commit this volume, with the rest of the series, to the indulgence which has hitherto made success in these labors possible.

J. P. B.

Cambridge, March, 1885.

CONTENTS.

BOOK I.

PRELIMINARIES.

BOOK II.

COMMON TO ALL OFFENCES.

BOOK III.

THE SPECIFIC OFFENCES.

BOOK IV.

BEFORE AND AFTER.

DIRECTIONS AND FORMS.

BOOK I.

PRELIMINARIES.

CHAPTER I.

IN GENERAL OF PRECEDENTS AND OTHER FORMS.

§ 1. **As of Three Parts.** — A form of indictment may be contemplated as consisting of three parts; namely, what is common to all indictments, what pertains to all for the specific offence, and what is special to the individual instance. And something like this may be said of the subsequent pleadings and other forms. Now, —

§ 2. **Books of Forms.** — A book of forms properly contains the first two parts. Such a book, in any department of the law, is helpful; and, in the criminal law, it is indispensable to the practitioner. Our criminal procedure runs so much in ruts that it is inconvenient, and offensive to the courts, for the pleader to depart from what is common, even though he invents a form legally sufficient. "Pleaders," said Wagner, J. in rebuke of what had been done in disregard of this rule, "should be more careful and pay some attention to the prescribed forms which have grown up and become familiar to the profession."[1] It is little short of an insult to a judge to compel him, without any necessity, to pass upon the sufficiency of a form got up for the occasion in disregard of established practice. But these observations do not

[1] The State *v.* Reakey, 62 Misso. 40, 41.

apply to the averments of those facts which are special to the particular instance. They ought to individualize the transaction complained of;[1] and, as transactions differ, the pleader cannot ordinarily, with true propriety, set out the facts special to his case in words which another pleader had employed in describing a different transaction. A book of forms, therefore, should contain the first two parts, and just and only enough of the third to illustrate to the practitioner the methods of its construction. How far otherwise our books of forms in the criminal law have commonly been made the reader familiar with them does not need to be told. The departures from this method, and their heaps of useless lumber, are patent on the face of most of them. Hence —

§ 3. **This Book.** — It is proposed, in the present work, simply to give so much and so many of the forms as are common to all cases, and to all of each class; with the directions and illustrative instances which will enable the pleader intelligently to fill in, for each emergency, the facts special to the individual instance. And, to supply him with all practicable help, so that he can look up for himself any question in its minuter details, references will be added to such other forms and precedents as our books contain. The difference, therefore, between those parts of this volume which consist of forms, and the books of forms and precedents in the criminal law heretofore in common use, is the same as between an exhaustive treatise on a legal subject, sustained by full citations of the authorities, and one or more volumes consisting of mere reports of cases and opinions of eminent lawyers.

§ 4. **Authority of Precedents.** — A precedent is a form which has been used, and has thus received a sort of judicial sanction. And as judicial usage is one of the evidences of the law,[2] precedents are looked upon as possessing more or less of authority. What is done daily in our courts, and not objected to, is presumably right. But not unfrequently a fatal omission or ill averment in an indictment passes for years, under the eye of able courts and counsel, unnoticed.[3] Such a course of things does

[1] Crim. Proced. I. § 566–584, 611, 619, 620.

[2] Stat. Crimes, § 104.

[3] Crim. Proced. II. § 587. An illustration of this may be seen in Commonwealth *v.* Wright, 1 Cush. 46, and Commonwealth *v.* Tarbox, 1 Cush. 66, where a form for a long series of years in common use in Massachusetts, and specially recommended by a famous prosecuting officer in a book

not make the precedent good against an objection clearly well taken in principle. Again, almost all our forms contain more or less words inserted from what is termed "abundant caution," where their necessity is not even seriously presumed. It would be absurd, therefore, to argue that, because a particular phrase is found in all the indictments for a given offence it is consequently indispensable.[1] But, with these qualifications, such of the precedents in our books as are taken from actual and long-continued usage are high evidence of what should be in allegation. Still, —

§ 5. **Our Form-books.** — In matter of fact, not all the forms in our books of "precedents of indictments" and the like are of this high order. They are of various grades; some of them are simply such as have been drawn by the author of the book or by some eminent pleader, having never been subjected to criticism in the tribunals. These, therefore, while suggestive, have little or no weight in authority. Moreover, —

§ 6. **Forms sustained by the Courts.** — In actual practice, when an indictment or other pleading has been neatly drawn, — when it is in arrangement perfect, and in matter clear and full, — in short, when it is without fault, not often is it questioned; so that, on this class of allegations, our courts seldom have occasion

of forms which he had compiled, was adjudged bad. These cases, I will say from remembrance, were argued in succession, and as though together, under a mutual understanding between the several counsel for the defendants. It was while I was a young lawyer in practice, but I took a leading part as to the point now alluded to. In each case, on the motion in arrest of judgment in the lower court, the judges of that court expressed the unqualified opinion that long usage in Massachusetts had changed for this State the common law on the subject. And in the higher court the attorney for the Commonwealth declared that to yield to the views urged for the defendants would be equivalent to opening the door of the State prison to one-third of its inmates. So far as research could disclose, the form controverted had been the uniform one, never departed from and never objected to, during the whole period covered by our published reports. It even appeared in cases in the reports where the indictment was held to be good, this particular question not having been raised. To meet this view, I brought forward what the reporter did not deem it necessary to preserve. I searched, spending a week's time, the unpublished records of the highest judicial court during the entire colonial period, and down somewhat below; and showed that, in every case involving the point, the form had been the same for which we contended. The change had come later; and, while never objected to, had never been adjudged good. Thus the case was won. And never did I have the slightest doubt, or know of a doubt in the mind of any one else, that the decision was right. The prisoners in the State prison did not hear of it, and so the prophecy of the attorney for the Commonwealth was not fulfilled.

[1] And see observations of Lord Kenyon, C. J. in Rex *v.* Crossley, 7 T. R. 315, 318.

to pass. It is when an indictment, for example, is obscure, or there is otherwise real doubt of its sufficiency, that it comes into judicial question. If it is sustained, forthwith all the inconsiderate members of our profession who, in every profession, constitute the majority, look upon it, preserve it, and guard it about, as pure gold tried in the fire They put their own good sense to sleep; and, when they have occasion to draw a like pleading, follow the "precedent." The average compiler takes this one, sets it in the best of printer's black ink, and passes it down for the admiration of ages. Thus the form which was too certainly correct for dispute is rejected, and the ill-shapen and doubtful one is crowned to reign forever. "This indictment," a learned judge once said, "was carelessly drawn, and should not be followed as a precedent;" while yet it was adjudged to answer the legal requirement.[1] In another case, the court observed: "This indictment is drawn in a careless manner, without regard to that precision and professional accuracy which should always be used in the preparation of such instruments. Indeed, it is a source of painful regret to notice the general want of skill so often manifest before us, in criminal cases, in the drawing of indictments. This, no doubt, often happens from the haste with which such matters are prepared on the circuits, and from the want of books and other conveniences necessary for the calm and deliberate performance of such duties."[2] Yet, should we trace carefully the history of our "honored precedents," we should find many of them to be made of this sort of stuff; their glory consisting of their grotesqueness, and their hoary snows. Nor should we, therefore, reject the old forms of this sort, but we should scrupulously avoid the adopting of like new ones.

§ 7. **Improving the Forms.** — In every other department, the law improves practically, the same as theoretically, with the decisions which render it more precise, just, and scientific. Not so in this. It matters not how often the courts decide, and how well every lawyer knows, that such allegations as the defendant's having committed the wrong "instigated by the devil," "not having the fear of God before his eyes," "with force and arms," and other like nonsense which originated in superstition and

[1] Bliss, J. in The State *v.* Murphy, 47 Misso. 274, 276. And see to the like effect Gay *v.* The State, 2 Texas Ap. 127.

[2] Ryland, J. in The State *v.* Edwards, 19 Misso. 674, 677.

stupidity, are of no legal effect; pleaders, down to the present moment, even in States wherein legislation has endeavored to simplify the averments, persist in inserting them.[1] And, not speaking of books for local use in particular States, the writer is not aware of any general one of forms for the indictment, wherein this absurd trash does not more or less abound; though it is less in some small volumes than in the larger. Is there any just reason that we should all shut our eyes as though we were fools, when dealing with matter of this sort? Again, the old forms are largely made up of awkwardly constructed sentences, containing thrice the number of words necessary to convey the idea. It might not be safe for one having no knowledge of the criminal law to undertake to reduce these expressions to proper shape. He might use the knife where he should not, and fear to prune where truly the operation was safe. But the adjudications are now sufficiently full to enable any one who has mastered the subject to do this work, if not in absolute perfection, with reasonably satisfactory results. Can any man assign a reason why it should not be done? Hence, —

§ 8. **How in this Volume.** — While the present author will ask neither courts nor counsel to rely on his skill, or to accept anything as by his authority, he will do, on the authority of the adjudged law, what in the way of improvement seems practically desirable. He will give, for each offence, an approved precedent, not with absolutely all the lumber of the darker periods of our law, but as pruned by modern hands. He will show what in the precedent is certainly unnecessary under the decisions of the tribunals. Having thus obtained a skeleton with the real bones and no false ones, he will proceed to show, as far as each step in the showing can be made certainly *safe*, how about the muscles and the superfluous fat. In this way, introducing also appropriate suggestions and references to authorities, we shall pursue our course to the end. And the result will be, that the pleadings prescribed by the common law will appear much less imperfect, while yet not all are without fault, than our "codifiers" and "reformers" commonly find it convenient to assume. Nor yet shall we overlook what legislation has done in the way of real or imaginary improvement.

[1] See post, § 42–49.

CHAPTER II.

SUGGESTIONS AS TO THE DRAWING OF THE INDICTMENT OR INFORMATION.

§ 9. **How Chapter divided.** — We shall consider, I. Practically of Brevity and how it is promoted; II. Directness and Distinctness of Allegation; III. Practical Methods for drawing the Indictment.

I. *Practically of Brevity and how it is promoted.*

§ 10. **How in Reason.** — The purpose of the indictment being to inform the defendant of what is to be produced against him, and guide the court at the trial, — it not being a lecture, a romance, or a poem, — it is, in reason, best when in the fewest and aptest words, with no superfluous matter. The rule of reason, therefore, is, that it should be in just so many and such terms as will simply accomplish this object, and no other or more. But, —

§ 11. **How in Practice.** — While there is nothing in the law forbidding the indictment to be so, and while even the principles of the law require this, the courts are to a great extent neglectful of their duty to restrain departures from what is thus obviously just. In Sir James Fitzjames Stephen's late admirable "History of the Criminal Law of England," we are told how it is there. Those who draw the indictment being, or having been, paid for their work in proportion to its length or number of counts,[1] they have trained themselves to make it very long. Nor

[1] 1 Stephen Hist. Crim. Law, 287, note.

have they deemed that much information should be conveyed by it to the defendant. "I have heard," he says, "of a very eminent special pleader who, when he had drawn a specially long indictment, used to 'shuffle his counts,' so that his opponent might find it, humanly speaking, impossible to understand what the indictment did and did not contain."[1] Again: "Indictments for fraudulent misdemeanors sometimes consist of more than a hundred counts, differing from each other almost imperceptibly by minute shades of meaning and expression. No one ever reads them except the clerk who compares the draft with the engrossed copy. . . . The judge never looks at the indictment unless his attention is directed to some particular point. . . . No undefended prisoner would get the least information from it."[2] The writer of this is a judge of the High Court of Justice, Queen's Bench Division. And he is one of those who habitually try criminal causes, and sit *en banc* for their review. Said another learned judge: "In my opinion, there cannot be a much greater grievance or oppression than these endless, voluminous, unintelligible, and unwieldy indictments. An indictment which fills fifty-seven close folio pages is an abuse to be put down. . . . Most of the persons who are accused of offences are in a line of life which does not enable them even to get a copy of such a charge from the clerk of assize, who will not part with it without his fees; and, when the party accused has obtained a copy, the greatest stretch of mind of the most trained persons can hardly, even for days, . . . find out what it is that is really the matter of criminal charge."[3]

§ 12. **A Death-bed Repentance.** — The late Joseph Chitty, the elder, famous on both sides of the Atlantic as a special pleader, compiler of precedents and other law books, and barrister, said in the last edition of his last work: "A scientific pleader" — he is speaking particularly of civil causes, but his observations apply equally to criminal — "would not incumber the record with unnecessary statements or complicated counts or pleas. . . . The late Mr. Justice Dampier rarely suffered more than one count to be introduced into a declaration; but then he took care first well to ascertain the facts, and he already knew the law. Precedents should merely assist, and never govern." He goes

[1] Ib. 290, note.
[2] Ib. 290, 291.
[3] Lord Denman, C. J. in O'Connell *v.* Reg. 1 Cox C. C. 413, 528, 11 Cl. & F. 155.

on to say how absolutely contrary to this rule the course of things has commonly been.[1] The whole passage, every word of which is just, has the true ring of a death-bed repentance. He had published collections of precedents, the chief ones whereof constitute the second and third volumes of "Chitty on Pleading," and the second, third, and fourth[2] volumes of "Chitty on Criminal Law," incumbered by the common verbosity and multiplicity of counts, and they had been widely circulated and used on both sides of the Atlantic. Did he not put upon the market the wares which purchasers demanded? But in atonement for his sins, if such they are to be deemed, he has left behind him advice which we shall do well to heed. He goes on to say: "As Dr. Johnson apologized for writing a long letter 'because he had not time to dictate a short one, that is, to consider and compress;' so the circumstance of a declaration or other pleading being very lengthy, in general indicates that it was framed hastily, or that the pleader had not sufficient knowledge of the law, or strength of mind, to enable and embolden him to compress, or still more disreputably that he crowded repetition or useless variations with the sordid and unworthy desire of increasing his own fee."[3] Will the writer of the present volume, and his publishers, fail to find a market for it, with a due return for his labor of authorship and their expenditures, because, written with three times the toil which two volumes would entail, it enables the practitioner, both to save himself work, and make the indictment what the true spirit of our law and the behests of justice require?

§ 13. **With us** — the practice is much as it is in England; but it varies with our States. In some of them, the lumber just described is piled high enough to shame even the worst English pleader. In others, the indictment is commonly simple, in one count unless special reasons properly require more, and not unreasonably long. And where verbosity is tolerated it is not eulogized.[4] In praise of the better course, Tarbell, J. once observed in the Mississippi court: "The indictment in this case

[1] 2 Chit. Gen. Pract. 3d ed. 44.

[2] Chitty on Criminal Law, as known through our American reprints, is in three volumes; but the English work is in four, the fourth volume not having been reproduced for American use.

[3] Chit. Gen. Pract. ut sup.

[4] See, for example, observations of Pearson, J. in The State *v.* Boon, 4 Jones, N. C. 463, 465.

pursues the precise language of the statute; it presents the issue fairly; and is commendable for discarding technicalities, which, having long since ceased to serve any useful purpose, cannot be otherwise than mischievous, although honored monuments in the progress of the jurisprudence of the world." [1]

§ 14. **Reform of Abuses.** — That the abuses above described need to be reformed no honest man will question; for not a word in their support can be found in all our books. If there are men to profit by them, still there are none to praise them. The courts can reform them if they choose. The draftsmen of the indictments, both in England and this country, are officers of the courts; compellable to obey, as to their acts connected with judicial proceedings, the judicial commands. Moreover, and if this were not so, the trial court has the power to quash an indictment drawn in a way to perplex or otherwise injuriously burden the defendant; compelling the prosecutor, if he would succeed, to prepare and lay before the grand jury a proper indictment. Or the judge can quash a part of the counts, or order separate trials on the several counts or clusters of them, or both. If he is not moved to do this, he can do it *ex officio*.[2] Sir James Fitzjames Stephen sets down the evil practice, suffered by the court of which he is a member, among the reasons why Parliament should enact a Criminal Code. He is silent as to the duty of the judges. One who saw less than he does of the good effects to come from codification, and more of what might result from practical improvements in the administration of the laws which we already have, would be apt to ask whether really a code will, better than the common law, administer itself without proper judicial supervision. Why should not the work of reform begin, where the neglect to supervise did, on the bench, with those whose duty it has always been to guide the course of justice and especially to protect from oppression persons accused of crime? A code could scarcely give fuller powers than the common law does, and it is difficult to see why the administration of the one may not as well lapse into neglect as of the other.

§ 15. **Exceptions as to Brevity. — (Avoiding Duplicity.)** — There are circumstances in which the briefest forms possible would not

[1] Riley *v.* The State, 43 Missis. 397, 421.

[2] All will be found explained in Crim. Proced. I. § 425, 447, 449, 454, 455, 458, 758, 759, 764, 766.

be the best, and then they should not be practically employed. For example, every charge should be made distinct; and, if two offences are to be averred against a defendant, both should not be huddled into one count. As to this, the rule of law[1] is the rule also of reason. Yet the just course may require more words than would the unjust. Again, —

§ 16. **Ill Form, which Court will accept.** — If the decisions have sustained a short form which really gives the prisoner no sufficient information of what is to be proved against him, a just prosecuting officer will either expand further the allegations in the indictment, or voluntarily tender to him a note or bill of the particulars. And if, as in a few instances it has happened, the courts violate constitutional guaranties by sustaining indictments really inadequate, such a prosecuting officer will add what the constitution requires, though the judge should deem it superfluous; because he, too, is acting under an oath to support the constitution. Moreover, —

§ 17. **Cases of Legal Doubt.** — There are cases wherein it is doubtful whether the court will deem a particular averment to be necessary or not; then it is generally, but not quite always, practically best to introduce it. Especially is this true in those States wherein the State has no appeal from the decision of an inferior judge on a question of law. Inevitably, in such a State, an indictment must be made to pass the scrutiny of the trial court, by whomsoever presided over, or justice will fail. And, in a larger view, "it is," in the words of Pollock, C. B. commonly "better to adhere to precedents than to make experiments with how little an indictable offence may be stated."[2] But there are circumstances wherein a far-seeing prosecuting officer will, even against great danger of overthrow, avoid a cumbersome and ill-constructed precedent in common use, for the chance of establishing a better form for the future, as well as proceeding more justly or more effectively in the individual case, — a question the decision whereof must ordinarily turn on what is special to the particular instance. Finally, —

§ 18. **Doubt on the Proofs.** — Where there is a doubt, or room for it, as to what form the proofs will assume at the trial, the considerate pleader will so arrange his allegations as to fit them for any event. This may require more counts than one for what

[1] Crim. Proced. I. § 432 et seq.

[2] Reg *v.* Webb, 3 Cox C. C. 183, 186.

is really a single offence, or it may not, according to the circumstances. No general rule can furnish a complete guide, but the pleader who has thoroughly qualified himself for his work will commonly find the course reasonably plain. While a bungler, for example, will have a count for each manner in which the one offence may have been committed, the skilful pleader will call to mind that, —

§ 19. **Offence committed in Different Ways.** — If the law permits an offence to be committed in different ways, a count is not double, but is good, which charges all the ways, unless repugnant.[1] And the pleader, by availing himself of this doctrine, can ordinarily anticipate, in a single count, any and every one of

[1] Post, § 21; Crim. Proced. I. § 434, 453; Stat. Crimes, § 244. Even so good a criminal-law lawyer as Sir James Fitzjames Stephen has, in his zeal to show the necessity of a criminal code, overlooked this principle. He says, that the rule which forbids the indictment to be double has caused very great "prolixity, obscurity, and expense." And he illustrates thus: "A policeman tries to apprehend a burglar, who fires a pistol in his face and gives him a serious wound in the mouth, knocking out a front tooth. This act is an offence under 24 & 25 Vict. c. 100, § 18, and might, though in practice it would not, be made the subject of the following counts," which, he adds further on, "is an illustration of the principal cause of the enormous length and intricacy of indictments." The possible counts, and, as I understand him, the inevitable ones so far as the uncertainties of the proof require variations in the charge, are: "1. Wounding with intent to maim; 2. wounding with intent to disfigure; 3. wounding with intent to disable; 4. wounding with intent to do some grievous bodily harm other than those above specified; 5. wounding with intent to resist lawful apprehension; 6. wounding with intent to prevent lawful apprehension; 7. wounding with intent to resist lawful detainer; 8. wounding with intent to prevent lawful detainer; 9–16, inclusive, causing grievous bodily harm with each of the eight intents before stated; 17–24 inclusive, shooting at the policeman with each of the eight intents before mentioned." 1 Stephen Hist. Crim. Law Eng. 289, 290. Now, if we look at the statute referred to, we shall find that a single count, not of great length and not intricate, will comprehend all that is thus set down for the twenty-four. So much of the 18th section as this writer means to indicate makes it a felony to "unlawfully and maliciously, by any means whatsoever, wound or cause any grievous bodily harm to any person, or shoot at any person . . . with intent . . . to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person." The single count, covering all the above matter, may, without the aid of modern statutes simplifying the indictment, be in terms like the following: —

The jurors of our lady the queen upon their oath present, that A, of, &c., on, &c., at, &c., having and holding in his hand a pistol loaded with gunpowder and one leaden bullet, did then and there, with intent then and there to resist and prevent one X, who was a policeman and had lawful authority then and there to apprehend and detain him the said A, from lawfully apprehending and detaining him, and with intent to maim, disfigure, and disable the said X, and to do him the grievous bodily harm of knocking out one and more of his teeth and other grievous bodily harm, did unlawfully and maliciously shoot off and discharge said loaded pistol at and upon said X, thereby and by means of said leaden bullet so shot off and discharged giving unlawfully and maliciously to said X one wound in his face, and knocking out one of his front teeth, and inflicting on and causing

the many uncertain forms which by possibility the proofs may assume. Thus, —

§ 20. **In Homicide.** — "Take the instance," said a learned judge, "of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow, or by the drowning, but leaves it uncertain by which." Must there be more counts than one? The judge, calling to mind a common practice, observes, that it "would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint result of both causes combined."[1] But plainly such a complication would be needless, and in some degree perplexing as to the proofs at the trial, and the form of the verdict of guilty, and the sentence. With equal legal effect and better practical results, the charge might be in one count of a death by both causes,[2] and the jury would be justified in a verdict of guilty if they believed from the evidence that it proceeded from either or from both. And —

§ 21. **In General.** — This method — namely, charging the offence, whatever it is, in one count, as committed in all the ways known to the law and not inevitably inconsistent with one another, within the probable range of the proofs, and directing the jury that they may find a verdict of guilty on being made satisfied of the truth of so much of the allegation as constitutes an offence — is abundantly sustained by the authorities;[3] while it is practically superior, above all comparison, to the lumbersome indictment of many counts. Let it be borne in mind, that what is thus to be set out is simply one transaction, which, and only which, is to be given in evidence to the jury. The charge, there-

him grievous bodily harm; against the peace of our said lady the queen [post, § 66, note], and contrary to the statute in such case made and provided.

There is nothing omitted from this form which could have been thrust into the entire twenty-four counts suggested, nor is there anything possible for them all to accomplish which this does not, and it is plain and distinct. It may lack something in rhetorical grace, but the accused person can discern what it means. It charges, as in reason every count should, but one offence; it is not double. Crim. Law, I. § 785; Crim. Proced. I. § 436; Stat. Crimes, § 244.

[1] Shaw, C. J. in Commonwealth *v.* Webster, 5 Cush. 296, 321.

[2] Joy *v.* The State, 14 Ind. 139.

[3] Ante, § 19; Crim. Proced. I. § 434–439; 484; II. § 106, 143, 171, 527, 656, 712, 815, 934; Reg. *v.* Williamson, 1 Cox C. C. 97; Commonwealth *v.* Brown, 14 Gray, 419; Commonwealth *v.* Macloon, 101 Mass. 1. And see Hudson *v.* The State, 1 Blackf. 317; Commonwealth *v.* Fox, 7 Gray, 585; Reg. *v.* O'Brian, 2 Car. & K. 115, 1 Den. C. C. 9.

fore, is homogeneous. The prisoner, the counsel, the court, the jury, all have before them the one thing and no more. On the one side, the endeavor is to establish so much of what is alleged as will constitute an offence; on the other side, to prevent this, or, failing, to reduce the offence to its smallest proportions. This is a leading method of the common law, which every trial judge has the power to compel the prosecutor to pursue, or abandon his case. Let us not cast it off till a better is proposed. And, further, —

§ 22. **Keeping Indictment to Facts.** — Where, as in most of our States, the prosecuting officer attends the grand jury, hears the evidence, advises with them, and then draws whatever indictment they determine to find,[1] there is ordinarily little occasion for a wide range of averment to meet possible surprises in the form of the proofs. And, in fairness, an indictment ought not to extend over ground in no way disclosed to the grand jury; though, in exact law,[2] the objection that there was before them no proof of a particular allegation cannot be made available at the trial.

§ 23. **Brief Statutory Forms.** — In some of our States, statutes have provided brief forms, declaring them sufficient, while still the pleader is at liberty to follow the common-law precedents if he chooses. Some of these statutory forms are practically unfit;[3] and some have been, and others will be, declared unconstitutional.[4] Still other of these forms are excellent, and, with true propriety, the pleader may substitute them for those of the common law.

§ 24. **Summary.** — The foregoing views, while suggestive, are not intended to exhaust the topic. We shall consider it, from time to time, in respect of the allegations for particular offences. In brief, commonly, where one crime only is meant to be charged, there should be but one count; yet to this there are exceptions, each depending on its own special reasons. Where, as is sometimes permissible, not always, more offences than one are meant, there must be a count for each offence, and there may be more. And, practically, the fewer superfluous words

[1] Crim. Proced. I. § 861, 863.

[2] Stat. Crimes, § 1048; Crim. Proced. I. § 864, 872, 886.

[3] Ante, § 16.

[4] Crim. Proced. I. § 103, 104; Stat. Crimes, § 981, 1036, 1037; Williams *v.* The State, 12 Texas Ap. 395, 397; McLaughlin *v.* The State, 45 Ind. 338; Brinster *v.* The State, 12 Texas Ap. 612.

an indictment contains, the better in nearly all cases will it subserve justice.

II. *Directness and Distinctness of Allegation.*

§ 25. **In General.** — What the law requires under this head is explained in other volumes of this series. But the suggestion here is, that, in practice, the pleader will do well to reject various permissible, indirect forms, and make his allegations blunt and distinct. For example, —

§ 26. **"For that whereas heretofore"** — may be adequate in recital, but it is not good for every averment;[1] direct language suffices in all, therefore a considerate pleader will rarely employ any other. Again, —

§ 27. **Participle.** — Though the participial form of the allegation is different, and is commonly good, even on the main charge,[2] there may be circumstances in which it will not be sufficiently direct. Therefore it is prudent to be cautious in its use, and avoid it where there is doubt. The pleader who remembers that he is accusing one, not playing the gentleman toward him, will have no practical difficulty under this head.

III. *Practical Methods for drawing the Indictment.*

§ 28. **What for this Sub-title and how divided.** — The introductory and closing parts of the indictment, which, in practice, the pleader will ordinarily have before him in a printed blank, are explained in the chapter after the next. We are here to consider only the body of it; as to, first, the indictment on the common law; secondly, the indictment on a statute; and, thirdly, what is common to both.

§ 29. First. *The Indictment on the Common Law:* —

Following Form. — If the indictment is purely at the common law, the judicious course, as to those parts of it which may always be the same for the same offence, is to follow the established common-law form, trying no experiments.[3] In some offences, not all, a careful study will be required as to the methods of alleging the —

[1] Crim. Proced. I. § 554; 1 Chit. Crim. Law, 231.

[2] Crim. Proced. I. § 556.

[3] Ante, § 2, 17.

§ 30. **Parts not in the General Form.** — The young pleader, not yet practically familiar with his work, should, after looking up the law of a case, set down in brief the several heads to which attention must be directed; then, with them before him, duly cover whatever of fact they require. After thus drawing the indictment, let him re-examine it with reference both to those heads and to what on a fresh reading he finds to be the law of the books.

§ 31. Secondly. *The Indictment on a Statute:* —

Following Common-law Forms. — The pleader should bear in mind, that, when a statute simply creates an offence by its common-law name, the common-law form of indictment is to be followed,[1] except in concluding against the form of the statute.[2] If, besides this, the statute adds an ingredient to the offence, the indictment adds it; being otherwise, except in its conclusion, the same as at the common law.[3] And there are some nice questions as to when a case comes within the latter distinction, and when it does not.[4]

§ 32. **Purely Statutory.** — If the statute both creates and defines an offence which was not such at the common law, the method is different.[5] Practically the pleader's course is as follows: —

Interpret Statute. — The indictment is not, as of course, to be drawn on the mere verbal statute, but on it as the court will interpret it.[6] Ordinarily the interpretation will be simply by its words; but sometimes words will be added to make it broader or narrower than its uninterpreted terms.[7] The pleader, therefore, should with his pencil insert in his copy of the statute any words which he thinks the court will incorporate into it. If he is doubtful how the interpretation will be, he should draw his indictment with reference to the several possible meanings. For this purpose, he will sometimes need to frame it in more counts than one. The indictment must cover the interpreted statute.[8] Now, —

§ 33. **Drawing Indictment.** — With the facts of his particular

[1] Crim. Proced. I. § 610; Stat. Crimes, § 416, 471.

[2] As to which, see Crim. Proced. I. § 599, 600.

[3] Crim. Proced. I. § 610; Stat. Crimes, § 416.

[4] For illustrations, see Stat. Crimes, § 412–415, 418, 421, 422, 471–476, 513–515.

[5] Crim. Proced. I. § 611.

[6] Ib. I. § 623 et seq.

[7] Stat. Crimes, § 79–81, 101, 120, 121, 145, 226 et seq., 243; Core *v.* James, Law Rep. 7 Q. B. 135.

[8] Ib.; Crim. Proced. I. § 523; Stat. Crimes, § 796.

case clear in his mind, he should so write them down as to weave into them the terms of the interpreted statute. In most of the States, he should appropriately introduce the word "feloniously," though not in the statute, if the offence is a felony.[1] He should duly aver time and place.[2] And he should make the specifications of the act sufficiently minute, and indicative of the species in distinction from the genus, with all other things of the sort, to individualize the transaction.[3] And he should obey all the other rules of pleading which relate to the indictment.

§ 34. **Comparing Work with Law.** — In a labor of this sort, one cannot be too careful. When, therefore, he has done it, let him read the interpreted statute clause by clause; and, at the end of each clause, and sometimes at each word, read over the whole indictment with reference to the particular clause or word.

§ 35. Thirdly. *What is Common to Both:* —

Practical Hints. — The following practical hints may be serviceable.

1. Never draw an indictment until you are certain of having mastered both the law and facts of your case.

2. Never draw one on the common law without a common-law form before you; or, on a statute, without the interpreted statute before you.

3. Introduce no allegation, and ordinarily no word, which is certainly needless.

4. Omit nothing, unless to gain some important object, concerning the necessity of which a question may be raised to embarrass the trial.

5. If the indictment is on a statute, always, unless in the clearest possible case and for some good reason, employ the exact words of the interpreted statute, and do not experiment with other words which you may deem to be sufficient as substitutes.

6. To this end, keep your eye constantly, while you are writing, on the interpreted statute or the common-law form.

7. So guard every expansion as not to incumber the record with needless matter alleged in a way to render proof of it necessary.

8. Consider how the proofs of every allegation will be; and, to the extent possible and just, so shape the averment as to simplify and make easy the proofs.

[1] Crim. Proced. I. § 533–537.
[2] Crim. Proced. I. § 360–414.
[3] Crim. Proced. I. § 566–584; Stat. Crimes, § 426, 440.

9. Consider, at each step, what expansions may be necessary to bring the charge within constitutional and common-law requirements.

§ 36. **Test Questions.** — When the indictment is done, lay before you the following questions, and put them severally, answering each only as the result of a fresh examination: —

1. Is the commencement right? the conclusion?

2. Allegations of time? of place?

3. Name of defendant? of person injured? of owner?

4. Descriptions of things? value?

5. Statutory words? exact? too many? too few? Allege more than statutory words?

6. Is everything which is essential to the punishment inserted? Set down each fact which the law makes so, and see that it is by direct and distinct words averred. Be sure to omit no one fact. Where any such fact, however minute, is absent, the indictment is bad, both under the common-law rules, and equally under our written constitutions, even though a statute declares that it shall be good.[1]

7. Are any negative averments necessary, and what? Is this indictment adequate as to them?

8. How as to such words as "wilfully," "maliciously," "knowingly," "feloniously," and the like?

9. Does any one count charge more than a single offence?

10. Are the conjunctions "or" and "and" rightly used?

11. Is all correct with respect to the rule that the indictment must fully charge a *prima-facie* offence, but it need not anticipate defences?

12. Is the rule that the species of things must be alleged, and the genus will not suffice, satisfied?

13. Is the offence otherwise sufficiently particularized?

14. If there are written instruments, are the allegations introducing them right? Are they set out in due form?

15. If there are oral words, are they properly averred?

16. Are the defendants rightly joined? the counts? Is no count repugnant?

17. When the proofs appear, will there be no variance?

[1] See, as to this, Crim. Proced. I. § 77–88, 95–112, 127, 325, 509, 519, 523, 538–542, 579, 580; II. § 48, 177, 565, 572, 575, 580, 582, 583; Stat. Crimes, § 166, 167, 427, 444, 445, 464, 945, 981, 1036, 1037, 1039, 1044 *a*.

CHAPTER III.

SUGGESTIONS AS TO PREPARATIONS FOR THE DEFENCE.

§ 37. **Preparation Essential.** — A wrongful conviction for crime is the very heaviest of calamities. And no lawyer would enter upon the defence of an indicted person of high rank without the most careful preparation. But most indicted persons are from the lower walks, and ignorant. Their ignorance renders preparation more essential for them than for the intelligent. Yet, because of their poverty, this the most essential part of their case is almost as of course neglected. Their defence, therefore, though made by counsel, becomes inadequate; and not unfrequently they are convicted, when, if they had simply trusted to the judge and jury without counsel, they would have been acquitted.

§ 38. **As to the Indictment.** — It is essential to look carefully into the indictment, and see whether or not it is adequate. The suggestions as to drawing the indictment, made in the last chapter for the benefit of prosecuting officers, will be equally available to the defendant's counsel. If it is outrageously lumbersome and wordy, he will consider whether or not to move the court to quash it, even assuming it not to be inadequate.[1] Not in all circumstances, but in some, whereof he will judge by the lights of the special facts, will this be his best first step. Then, by the old practice, if the indictment was found to be ill, the course was, in most instances, to go to trial upon it and in case of conviction move in arrest of judgment.[2] But now, in most of our States, there are statutes, differing in terms, yet in one way or another purporting to require defendants to object to the indictment, if at all, at an earlier stage of the proceedings. Such a statute can properly serve as a shield to protect what is defective in form, or in terms not duly specific; but whether, under

[1] Ante, § 14.

[2] 1 Chit. Crim. Law, 304, 661, 662.

our written constitutions, it can go further is a question not well illumined by adjudication.[1] In reason, it cannot. To permit one to be hung as for murder on the allegation that he spoke saucy words to a late living person, now deceased, would be equivalent to hanging him without any charge, and without any trial. To add simply the further averment that he gave the deceased a blow, and then have him hung, would be only the same thing. And if we carry on this reasoning through its remaining steps, we shall arrive at the conclusion that, under our constitutions, there can be no punishment as for crime, however one arrested waives his rights, unless the indictment or information sets down every ingredient which the law has specified as an element in the crime.[2] Whether, in spite of the statute, this doctrine can be made available under a motion in arrest of judgment, or whether a writ of *habeas corpus* or of error will be the proper method, can be determined only on a consideration of all the statutes. The principle is, that legislation may define the remedy, but it cannot take away all remedy.[3]

§ 39. **As to the Facts.** — A careful looking after the facts is always important. And when the accused person is imprisoned, and especially when he is also penniless, this may become a matter of extreme difficulty. But it is not within the sphere of a work of the present sort to point out the course in the numberless varying circumstances possible to arise. Yet, in all cases, the practitioner is under the highest obligations to look carefully after —

§ 40. **The Law.** — Criminal law learning, especially in our commercial communities, is at the time of this writing at its very lowest ebb. This fact places upon the practitioner for the defence a duty as to the law more burdensome than is common in civil causes. It gives him also a special advantage, if he is one of the few who have the wisdom to see and seize it. Almost as of course, though with many exceptions, the prosecuting officer knows little or nothing of the criminal law. And it is the same with the judge. In this condition of things, an able lawyer who will study and learn the criminal law has it in his power to become ordinarily master of the situation in cases of defence.

[1] Crim. Proced. I. § 1287 and the places there referred to; Stat Crimes, § 1116.

[2] Ante, § 36, question 6, and the places there referred to.

[3] Stat. Crimes, § 85 *a*, 176–178.

One, to occupy this position, must not be content with simply posting himself up for the several occasions, but he must familiarize himself with the entire law of crimes. Then, in each case, he can go before the court prepared to take advantage of the blunders of the prosecuting officer, and to instruct the judge. As men are most confident of the depth of their knowledge when it is the most shallow, he will be obliged to use special adroitness in the manner of his teachings, and particularly not to appear to teach. The reasons of the criminal law, in all its parts, must have become parcel of his understanding; and everything he propounds or argues should, if possible, be stated on a formula of those reasons. In this way, his mere enunciations will in most instances carry conviction, and the judicial judgment will be quietly borne along to the just conclusions. "But," says one, "the just conclusions are precisely what I must avoid if I would save my client." When this is so, the end may sometimes be secured by abstaining from any interruption of the prosecuting officer and the court while shaping the law according to their own ideas, or sometimes by referring to expositions of legal doctrine by an incompetent or careless author or judge, or even by following up such reference in an argument on the wrong side. Is this method right? It is not right, and it would deserve severe punishment, for a practitioner to falsify, or to mislead the court. Nor yet, if he could avoid detection for the moment, would it be in the end compatible with his true interests. But it is not his privilege to decide the law of the case, or pass upon the accuracy of what an author or judge has laid down in a book to which the court permits reference; nor yet is it his duty to help the officials, appointed by the prosecuting public, to convict the client whom he is sworn faithfully to defend and protect. In conclusion, —

§ 41. **Differing Cases.** — Since the cases will differ, what further is to be suggested on the subject of this chapter will be set down under the titles of the several offences in a subsequent division of the present volume.

BOOK II.

COMMON TO ALL OFFENCES.

CHAPTER IV.

FAMILIAR ALLEGATIONS WHICH ARE TO BE OMITTED BECAUSE NEEDLESS.

§ 42. **Elsewhere and here.** — In other parts of this series, various common allegations of the indictment have been pointed out as needless; but, for the convenience of the practitioner, the more familiar ones will be here inserted together.

§ 43. **Force and Arms.** — By the ancient common law, the words "with force and arms," *vi et armis*, to which were commonly added *videlicet*, *cum baculis*, *cultellis*, *arcubus*, *et sagittis*, were necessary in certain classes of indictments. But a statute of Henry VIII.,[1] which is common law in this country, dispensed with them. At first, the courts disagreed as to whether it extended to *vi et armis*, or only to the particularization which followed. The wider interpretation prevailed; and, since nearly a century before the American Revolution, there is reported no English case, and there has never been an American one, wherein the indictment was held ill for the lack of any of these words.[2] Besides, there are in most of our States statutes which expressly or by construction render them unnecessary. Still, in practice, our pleaders cling to the expression "with force and arms" as for dear life. Even in States where short forms are provided by legislation, many of the pleaders can no more give them up than their very eyes. They use them even in cases where the ancient

[1] 37 Hen. 8, c. 8. By its terms it extended only to the "inquisition or indictment." As to the declaration in a civil suit, see Sawe *v.* King, 1 Saund. 81; Gould Pl. 187–189.

[2] Crim. Proced. I. § 502, 648, note.

common law did not require them.[1] The present author, endeavoring to stem the prejudice, will omit them from this collection.

§ 44. **Fear of God — Instigated by Devil.** — Words which were never necessary, yet were common in the old forms, and are still not banished from our reports of cases and books of precedents, are, that the defendant committed the offence "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil."[2] Let us try, in this country, to get on without this remnant of a faded-out superstition.

§ 45. **Not regarding Law.** — Another allegation, plainly unnecessary and better practically not to be employed, is, that the defendant committed the criminal act "little regarding the laws of this realm or the pains and penalties in the same contained."[3]

§ 46. **Bad Disposition.** — Many of the forms aver, in varying words, that the defendant was of a bad disposition; as, "being an evil-disposed person,"[4] "being an evil-minded and cruelly disposed person,"[5] "being a person of wicked, dishonest, and evil

[1] For example, persons are indicted for receiving stolen goods "with force and arms," Commonwealth *v.* Cohen, 120 Mass. 198; for obtaining money by false pretences "with force and arms," People *v.* Cooke, 6 Parker C. C. 31; for betting money, Drew *v.* The State, 5 Eng. 82, and selling liquor, "with force and arms," Woody *v.* The State, 32 Ga. 595; for having unlawfully in possession forged paper "with force and arms," Cantor *v.* People, 5 Parker C. C. 217; for marrying, while having a husband or wife living, another person, "with force and arms," Hayes *v.* People, 5 Parker C. C. 325; for unlawfully keeping for sale intoxicating liquor, The State *v.* Tracey, 12 R. I. 216, or keeping a disorderly house, Smith *v.* Commonwealth, 6 B. Monr. 21, or bawdy-house, Thompson *v.* The State, 1 Texas Ap. 56, or letting a house for bawdry, Smith *v.* The State, 6 Gill, 425, or exposing the person, The State *v.* Roper, 6 Dev. & Bat. 208, or unlawfully establishing a lottery, "with force and arms," Holoman *v.* The State, 2 Texas Ap. 610; for committing open and gross lewdness "with force and arms," The State *v.* Osborne, 69 Misso. 143; and a clergyman is indicted for celebrating the marriage of a minor, without consent of parents, "with force and arms," The State *v.* Willis, 4 Eng. 196.

[2] 2 Chit. Crim. Law, 319, 321, and multitudes of other places; The State *v.* Chandler, 2 Harring. Del. 553; The State *v.* Jeffreys, 3 Murph. 480; Crim. Proced. I. § 501. Mr. Justice Stephen, in his "History of the Criminal Law of England," London, 1883, speaking (Vol. I. p. 286) of the provision in 14 & 15 Vict. c. 100, § 24, that "no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved," says: "This did away with the statements that the crime was committed by a person 'not having the fear of God before his eyes,' and, 'at the special instigation of the devil.'" It is impossible that this learned writer really believed these words ever to have been essential. The oversight must be attributed to his zeal for codification, to promote which his, in the main, excellent history was written. And see ante, § 19, note.

[3] 2 Chit. Crim. Law, 321.

[4] Ib. 116, 119; Hamilton *v.* Reg. 2 Cox C. C. 11; The State *v.* Boon, 4 Jones, N. C. 463.

[5] Cowley *v.* People, 21 Hun, 415, 417.

mind and disposition," [1] "being a person of unfeeling and inhuman disposition," [2] "being a person of envious, evil, malicious, and wicked mind." [3] It is surely not necessary to say that all such expressions are lumber which is better omitted. What if a juror, with mind in a fog similar to the pleader's, and believing the defendant's disposition to be good, while yet he committed the offence, should deem the indictment not proved, and refuse assent to a verdict of guilty?

§ 47. **In Peace.** — Some of the forms aver that the person assaulted or killed was "in the peace of God and the king" [4] or "the State." [5] Yet these expressions are worse than useless.[6]

§ 48. **Other Unnecessary** — expressions are —

Damage. — "To the great damage" of the person injured; —

Example. — "To the evil example of all others;" [7] —

Displeasure of God. — "To the great displeasure of Almighty God." [8]

§ 49. **Still Others.** — The foregoing are specimens of pernicious verbosity in forms too much in use. Other instances are pointed out in "Criminal Procedure" and "Statutory Crimes." The author, in the following pages, will endeavor to do his part toward weeding out the entire tangle of this rubbish. If pleaders will hereafter help him, the records of our courts will, at least, appear distinct and clean.

[1] 2 Chit. Crim. Law, 232; Brown *v.* The State, 2 Texas Ap. 115; Morton *v.* The State, 3 Texas Ap. 510.

[2] Reg. *v.* Chandler, Dears. 453, 454.

[3] Morton *v.* The State, 3 Texas Ap. 510; Rex *v.* Carlile, 1 Cox C. C. 229.

[4] Reg. *v.* Sawyer, 2 Car. & K. 101; O'Neill *v.* Reg. 6 Cox C. C. 495, 496.

[5] Moore *v.* The State, 2 Ohio State, 500.

[6] Crim. Proced. I. § 502; II. § 57, 504.

[7] As, for illustration, in Campbell *v.* Commonwealth, 9 Smith, Pa. 266.

[8] Crim. Proced. I. § 500, 647; II. § 57.

CHAPTER V.

THE INTRODUCTORY AND CLOSING PARTS OF THE INDICTMENT OR INFORMATION AND THE INDORSEMENTS THEREON.

§ 50. **In General. — (Differences in States).** — The law of this subject is explained in "Criminal Procedure." While the principles relating to it are uniform, the practice differs considerably in our States.[1] Now, —

§ 51. **Printed Blanks.** — Printing promotes accuracy; and, within limits which vary with circumstances, it saves labor. It can be everywhere had. Therefore no judicious prosecuting officer will attempt to get on without blanks whereon are printed the commencement, the concluding part, and the indorsements of the indictment or information, being the same in all offences. These forms this officer will settle once for all, according to the law and the practice of his particular State. In a compact community, where many indictments are to be drawn, he will have also fuller forms for the more common offences; such as larceny, burglary, arson, assault and battery, and others practically found desirable.

§ 52. **How Chapter divided.** — We shall consider, I. The Caption; II. The Commencement; III. The Concluding Part; IV. The Indorsements.

I. *The Caption.*

§ 53. **In Limited Jurisdiction.** — Where the court is of special or limited jurisdiction, so that its authority to entertain the

[1] As to the caption and commencement, Crim. Proced. I. § 653–668; as to the concluding part, Ib. § 647–652*a*; as to indorsements, Ib. § 690–704.

indictment must appear in the record,[1] the caption is ordinarily the part of it to which this matter is allotted, and it may be as follows: —

STATE OF NEW YORK.[2]

CITY AND COUNTY OF NEW YORK, ss.

Be it remembered, that at a Court of General Sessions of the Peace holden at, &c. in and for the city and county of New York, on the first Monday of June, in the year of our Lord one thousand eight hundred and sixty-five, before John T. Hoffman, Esquire, Recorder of the said city of New York, justice of the said court assigned to keep the peace of the said city and county of New York, and to inquire by the oaths of good and lawful men of the said county of all crimes and misdemeanors committed or triable in the said county, to hear, determine, and punish according to law all crimes and misdemeanors in the said city and county done and committed. By the oath of John T. McKesson, Foreman [here add the several names of the other grand jurors],[3] it was [is[4]] then and there presented as follows, that is to say.[5]

§ 54. **In General Jurisdiction.** — Where the court is of superior and general jurisdiction, it is not uncommon for the caption simply to say: —

KNOX, ss.

At the Supreme Judicial Court begun and holden at Rockland, within and for the county of Knox, on the second Tuesday of March, in the year of our Lord one thousand eight hundred and eighty-one, the jurors, &c.[6]

§ 55. **In the United States Courts,** — the form may, for example, be —

In the Circuit Court of the United States of America, holden in and for the Eastern District of Pennsylvania, of April sessions, in the year of our Lord one thousand eight hundred and thirty, the jurors, &c.[7]

§ 56. **In General.** — The foregoing forms are in actual use; yet

[1] Crim. Proced. I. § 657, 663, 1350.

[2] Common and proper, but not necessary. Crim. Proced. I. § 383.

[3] But the names are generally held to be unnecessary. Crim. Proced. I. § 665, 666.

[4] Ordinarily "is." As to the distinction, see Crim. Proced. I. § 657, 658 and note, 1349.

[5] Keefe *v.* People, 40 N. Y. 348. And see, for forms, 2 Hale P. C. 165; 6 Went. Pl. 357, 373; 4 Chit. Crim. Law, 189–195, 258; Archb. Crim. Pl. & Ev. 19th ed. 40; Rex *v.* Brooks, Trem. P. C. 151; Rex *v.* Townley, 18 Howell St. Tr. 329, 332; Rex *v.* Fearnley, 1 T. R. 316; Holloway *v.* Reg. 2 Den. C. C. 287.

[6] The State *v.* Jackson, 73 Maine, 91; The State *v.* Hurley, 71 Maine, 354; The State *v.* Conley, 39 Maine, 78; The State *v.* Bartlett, 55 Maine, 200; Turner *v.* Commonwealth, 5 Norris, Pa. 54; Crim. Proced. I. § 665, note. And see Broome *v.* Reg. 12 Q. B. 834; Crim. Proced. I. § 658.

[7] United States *v.* Wilson, Bald. 78; United States *v.* Dawson, Hemp. 643, 644.

their insertion here is only suggestive to the practitioner, who will frame this matter with due regard to the requirements and usages in his own tribunals.[1]

II. *The Commencement.*

§ 57. First. *To the Indictment:* —

May be Short. — A commencement which is not required to supply defects in the caption[2] may be brief. Thus, —

§ 58. **In England.** — The common form in England has been from early times, and is, —

The jurors of our lady the queen [*or* lord the king] upon their oath present, that, &c.[3]

With us — the like form is common, but not universal; namely, —

The jurors of the State of —— [*or* of the Commonwealth of ——, *or* of the People of the State of ——, *or* of the United States of America] on their oath [*or* oath and affirmation] present, that, &c.[4]

Under Statutes. — In a considerable number of our States, statutes have directly or by implication provided the form. It is not the same in all these States, and to transcribe into these pages the various statutes would be useless.[5]

[1] And see Crim. Proced. I. § 656–659, 663–667; Keithler *v.* The State, 10 Sm. & M. 192, 196; Mitchell *v.* The State, 8 Yerg. 514; The State *v.* Freeman, 21 Misso. 481, 483; Benedict *v.* The State, 12 Wis. 313; Bass *v.* The State, 17 Fla. 685; Dowling *v.* The State, 5 Sm. & M. 664; Goodloe *v.* The State, 60 Ala. 93; Carpenter *v.* The State, 4 How. Missis 163; Woodsides *v.* The State, 2 How. Missis. 655; Mitchell *v.* The State, 1 Texas Ap. 725, 726; Mills *v* The State, 52 Ind. 187; Lovell *v.* The State, 45 Ind. 550; The State *v.* Zule, 5 Halst. 348.

[2] Crim. Proced. I. § 660.

[3] Archb. Crim. Pl. & Ev. 19th ed. 26; 1 Stephen Hist. Crim Law, 276; 2 Chit. Crim. Law, 1 et seq.; Rex *v.* Sanquire, 2 Howell St. Tr. 743; Rex *v.* Audley, 3 Howell St. Tr. 401, 406; Reg. *v.* Lister, 7 Cox C. C. 342, 344; Reg. *v.* Ryland, Law Rep. 1 C. C. 99. The same in the colonies. Whelan *v.* Reg. 28 U. C. Q. B. 2, 7.

[4] Crim. Proced. I. § 668; Jeffries *v.* Commonwealth, 12 Allen, 145; Commonwealth *v.* Glover, 111 Mass. 395, 396; Commonwealth *v.* Costley, 118 Mass. 1. Doubtless this short form, which practically is short enough, will bear further abridgment. Thus, where the word "present" was omitted, it was sustained. The State *v.* Freeman, 21 Misso. 481. And it appears to be sufficient to say, "The jurors for the State upon their oath present," &c. The State *v.* Scott, 2 Dev. & Bat. 35. **Territory.** — In a case now before me, where the indictment was in a court of a Territory of the United States, the form was: "The grand jurors of the Territory of Kansas, impanelled and sworn to inquire within and for the county of Leavenworth, upon their solemn oaths and affirmations do present." Territory *v.* Reyburn, McCahon, 134. Perhaps it would be more nicely accurate to say, "The jurors of the United States, in and for the Territory of Kansas, on their oath and affirmation present."

[5] For illustrations, consult Cothran's

In General. — There are other variations, either of what is required or what is customary. But, as to all, the forms before given, and a simple reference to cases containing forms, will suffice.[1]

Rev. Stats. of Ill. p. 408, § 408; Ala. Code of 1876, § 4824; Reed's Ga. Crim. Law, 215; Garling *v.* The State, 2 Texas Ap. 44; The State *v.* Mohr, 53 Iowa, 261; Commonwealth *v.* Stephenson, 3 Met. Ky. 226; McCutcheon *v.* People, 69 Ill. 601; Noles *v.* The State, 24 Ala. 672, 688; Perkins *v.* The State, 50 Ala. 154; Walker *v.* The State, 35 Ark. 386; People *v.* War, 20 Cal. 117; The State *v.* Davis, 22 Minn. 423.

[1] *Alabama.* — The State *v.* Bell, 5 Port. 365; Reeves *v.* The State, 20 Ala. 33, 35; Noles *v.* The State, 24 Ala. 672, 688; Lowenthal *v.* The State, 32 Ala. 589; McGuire *v.* The State, 37 Ala. 161; Schuster *v.* The State, 48 Ala. 199; Anderson *v.* The State, 48 Ala. 665; Caldwell *v.* The State, 49 Ala. 34; Diggs *v.* The State, 49 Ala. 311; Perkins *v.* The State, 50 Ala. 154; Sanders *v.* The State, 55 Ala. 183, 184; Glenn *v.* The State, 60 Ala. 104. And see Crim. Proced. I. § 665, note.

Arkansas. — The State *v.* Willis, 4 Eng. 196; Dixon *v.* The State, 29 Ark. 165, 167; The State *v.* Hinson, 31 Ark. 638; Martin *v.* The State, 32 Ark. 124; Bradley *v.* The State, 32 Ark. 704; Howard *v.* The State, 34 Ark. 433, 435; Walker *v.* The State, 35 Ark. 386; Bridges *v.* The State, 37 Ark. 224; McClure *v.* The State, 37 Ark. 426. And see Crim. Proced. I. § 665, note.

California. — People *v.* Saviers, 14 Cal. 29; People *v.* Mills, 17 Cal. 276; People *v.* War, 20 Cal. 117.

Georgia. — Long *v.* The State, 12 Ga. 293.

Illinois. — Nixon *v.* People, 2 Scam. 267; Townsend *v.* People, 3 Scam. 326; Fairlee *v.* People, 11 Ill. 1; McCutcheon *v.* People, 69 Ill. 601, 602. And see Crim. Proced. I. § 665, note.

Indiana. — Dukes *v.* The State, 11 Ind. 557; Mains *v.* The State, 42 Ind. 327; Lovell *v.* The State, 45 Ind. 550; Mills *v.* The State, 52 Ind. 187; Snyder *v.* The State, 59 Ind. 105; Edwards *v.* The State, 62 Ind. 34; Mitchell *v.* The State, 63 Ind. 276; The State *v.* Howard, 63 Ind. 502; Batterson *v.* The State, 63 Ind. 531; The State *v.* Stephens, 63 Ind. 542; Shepherd *v.* The State, 64 Ind. 43; Howard *v.* The State, 64 Ind. 516; Manheim *v.* The State, 66 Ind. 65; The State *v.* Stewart, 66 Ind. 555. And see Crim. Proced. I. § 665, note.

Iowa. — The State *v.* Reid, 20 Iowa, 413, 417; The State *v.* Close, 35 Iowa, 570; The State *v.* Jordan, 39 Iowa, 387; The State *v.* Book, 41 Iowa, 550; The State *v.* Bauman, 52 Iowa, 68; The State *v.* Mohr, 53 Iowa, 261.

Kansas. — Rice *v.* The State, 3 Kan. 141, 156.

Kentucky. — Commonwealth *v.* Stephenson, 3 Met. Ky. 226.

Maine. — The State *v.* Conley, 39 Maine, 78; The State *v.* Stevens, 40 Maine, 559; The State *v.* Bartlett, 55 Maine, 200; The State *v.* Corson, 59 Maine, 137; The State *v.* Smith, 65 Maine, 257; The State *v.* Smith, 67 Maine, 328; The State *v.* Goddard, 69 Maine, 181; The State *v.* Hurley, 71 Maine, 354; The State *v.* Jackson, 73 Maine, 91.

Massachusetts. — Commonwealth *v.* Cohen, 120 Mass. 198; Commonwealth *v.* Howe, 132 Mass. 250, 251. And see Crim. Proced. I. § 665, note.

Minnesota. — The State *v.* Davis, 22 Minn. 423; The State *v.* Armington, 25 Minn. 29.

Missouri. — The State *v.* England, 19 Misso. 386; The State *v.* Freeman, 21 Misso. 481; The State *v.* Ragan, 22 Misso. 459; The State *v.* Cutter, 65 Misso. 503; The State *v.* Osborne, 69 Misso. 143; The State *v.* Hatfield, 72 Misso. 518. And see Crim. Proced. I. § 665, note.

Nevada. — The State *v.* Malim, 14 Nev. 288.

New Jersey. — See Crim. Proced. I. § 665, note.

New Mexico. — Territory *v.* Sevailles, 1 New Mex. 119.

New York. — Woodford *v.* People, 5 Thomp. & C. 539; People *v.* Bennett, 37 N. Y. 117, 122; Keefe *v.* People, 40 N. Y. 348; People *v.* Smith, 1 Parker C. C. 329; People *v.* Thoms, 3 Parker C. C. 256; People *v.* Sweetman, 3 Parker C. C. 358; Goodrich *v.* People, 3 Parker C. C. 622;

§ 59. Secondly. *To the Information:*[1] —

Variable. — Neither law nor usage has established any one unvarying form. But, —

§ 60. **Common.** — Where the attorney for the State proceeds as of right, it will accord with what is common in England and a part of our States to say, after properly entitling the cause: —

Be it remembered, that George G. Wadley, Esquire, Attorney-General, &c. [*or* County Attorney, &c.] who prosecutes on behalf of the State, comes here in person into court, at this —— term thereof, and for the State gives the court to understand and be informed, that, &c.[2]

In other States, — the form would vary, but it may be: —

George G. Wadley, Esquire, &c., comes here into court, on, &c., and in the name and on behalf [and by the authority[3]] of the State, gives this court to understand and be informed.[4]

Didieu *v.* People, 4 Parker C. C. 593; Cantor *v.* People, 5 Parker C. C. 217; Hayes *v.* People, 5 Parker C. C. 325; Cohen *v.* People, 5 Parker C. C. 330; Quinlan *v.* People, 6 Parker C. C. 9; People *v.* Cooke, 6 Parker C C. 31. And see Crim. Proced. I. § 665, note.

North Carolina. — The State *v.* Smith, 3 Hawks, 378; The State *v.* Jasper, 4 Dev. 323; The State *v.* Cobb, 1 Dev. & Bat. 115; The State *v.* Davis, 2 Ire. 153; The State *v.* Huntly, 3 Ire. 418; The State *v.* Farmer, 4 Ire. 224; The State *v.* Tolever, 5 Ire. 452; The State *v.* Clark, 8 Ire. 226; The State *v.* Williams, 7 Jones, N. C. 446; The State *v.* Whitchurst, 70 N. C. 85; The State *v.* Walker, 87 N. C. 541.

Ohio. — Mackey *v.* The State, 3 Ohio State, 362, 366; Fouts *v.* The State, 8 Ohio State, 98, 116; Robbins *v.* The State, 8 Ohio State, 131, 132; Clarke *v.* The State, 8 Ohio State, 630; Davis *v.* The State, 19 Ohio State, 270, 271; Egner *v.* The State, 25 Ohio State, 464, 465.

Pennsylvania. — The common form of commencement appears to be: "The grand inquest of the Commonwealth of Pennsylvania, inquiring in and for the county of ——, upon their oaths and solemn affirmations respectfully do present." But there are slight variations. Commonwealth *v.* Sharpless, 2 S. & R. 91; Sherban *v.* Commonwealth, 8 Watts, 212; Comfort *v.* Commonwealth, 5 Whart. 437; Commonwealth *v.* Jackson, 1 Grant, Pa. 262; Hackett *v.* Commonwealth, 3 Harris, Pa. 95; Campbell *v.* Commonwealth, 3 Norris, Pa. 187; Turner *v.* Commonwealth, 5 Norris, Pa. 54; Brandt *v.* Commonwealth, 13 Norris, Pa. 290.

Tennessee. — The State *v.* Saylor, 6 Lea, 586.

Texas. — Garling *v.* The State, 2 Texas Ap. 44; Conner *v.* The State, 6 Texas Ap. 455, 457; Ferguson *v.* The State, 6 Texas Ap. 504.

Vermont. — See Crim. Proced. I. § 665, note.

Virginia. — Johnson *v.* Commonwealth, 29 Grat. 796.

West Virginia. — The State *v.* Baltimore, &c. Railroad, 15 W. Va. 362; The State *v.* Lusk, 16 W. Va. 767.

Wisconsin. — See Crim. Proced. I. § 665, note

United States. — The form varies somewhat with the practice in the particular State in which the district is located. And see United States *v.* Paul, 6 Pet. 141; United States *v.* Mulvaney, 4 Parker C. C. 164; United States *v.* Wilson, Bald. 78; United States *v.* Dawson, Hemp. 643, 644.

[1] Crim. Proced. I. § 144–147, 712–715.

[2] Crim. Proced. I. § 146; 2 Chit. Crim. Law, 6; Archb. Crim. Pl. & Ev. 19th ed. 116; Rex *v.* Stratton, 21 Howell St. Tr. 1045, 1049; Rex *v.* Wilkes, 19 Howell St. Tr. 1382; Rex *v.* Sutton, 1 Saund. 269 *d*; Commonwealth *v.* Feely, 2 Va. Cas. 1; Commonwealth *v.* Stockley, 10 Leigh, 678.

[3] Crim. Proced. I. § 668.

[4] People *v.* McKinney, 10 Mich. 54;

§ 61. Thirdly. *Before a Magistrate:* —

Variable. — The form of the information, complaint, or affidavit, on a proceeding commonly instituted by a private person or a police officer before an inferior magistrate,[1] differs in our States.

§ 62. **In England.** — Chitty's form for the commencement is: —

Middlesex, to wit. The information and complaint of James Johnson, of, &c., taken and made on the oath of the said Johnson, before me, Richard Robinson, Esquire, one of his majesty's justices of the peace in and for the said county, on, &c., who on his oath saith, that, &c.

Or, —

Middlesex, to wit. Be it remembered, that, on, &c., in, &c., James Johnson, of, &c., in his proper person cometh before me, Richard Robinson, Esquire, one of his majesty's justices of the peace in and for the said county, and upon his oath maketh complaint, that, &c.[2]

§ 63. **With us,** — the commencement follows more or less closely these English forms, but varying with the local practice and the tastes of the particular pleader.[3]

§ 64. Fourthly. *More Counts than one:* —

How. — Where there are more counts than one, the commencement, unlike the caption which covers the entire indictment, should be repeated at each count. But since it is permissible to refer from one count to another,[4] this is commonly done in an abbreviated form, thus, —

And the jurors aforesaid upon their oath aforesaid do further present.[5]

Or, —

And the attorney as aforesaid, who prosecutes as aforesaid, [*in some States adding*,[6] in the name and by the authority aforesaid], further gives this court to understand and be informed.[7]

Shafer *v.* The State, 18 Ind. 444; The State *v.* Smith, 13 Kan. 274, 277; The State *v.* Cassady, 12 Kan. 550; Walker *v.* The State, 23 Ind. 61; Sneed *v.* People, 38 Mich. 248; Crim. Proced. I. § 146, note.

[1] Crim. Proced. I. § 148–154, 230–239 *a*, 716–727.

[2] 4 Chit. Crim. Law, 1.

[3] Kinsman *v.* The State, 77 Ind. 132; The State *v.* Thompson, 44 Iowa, 399; The State *v.* Woulfe, 58 Ind. 17; Schmidt *v.* The State, 78 Ind. 41; Housh *v.* People, 75 Ill. 487.

[4] Crim. Proced. I. § 429–431.

[5] 2 Chit. Crim. Law, 3; The State *v.* McAllister, 26 Maine, 374.

[6] Crim. Proced. I. § 668.

[7] 2 Chit. Crim. Law, 6.

III. *The Concluding Part.*

§ 65. **Diversities in our States.** — Under the differing written constitutions and statutes of our States, there are considerable diversities as to what the concluding part of an indictment must contain.[1]

§ 66. **At Common Law,** — the following, not considering now whether anything or what further is required in nuisance and treason,[2] is the form: —

Against the peace [and dignity[3]] of the State [*or* Commonwealth, *or* United States of America[4]].

On Statute. — Where the indictment is on a statute, the conclusion is —

Against the peace [&c., *as above*], and contrary to the form of the statute [*or* statutes[5]] in such case made and provided.[6]

Constitutional Forms. — If the constitution prescribes a form of conclusion, the pleader should carefully copy its words.[7]

§ 67. **Every Count.** — Except where a statute permits otherwise, this conclusion must be attached to each several count.[8]

§ 68. **The Information** — has, to every count, the same conclusion as the indictment;[9] to which is added, not necessarily,[10] but in proper cases, and not to each count, but to the entire information, a —

[1] As to the whole question, see Crim. Proced. I. § 647–652 *a*.

[2] Ib. I. § 647; II. § 863, 864, 897, 1034.

[3] Unnecessary at common law, 2 Hale P. C. 188; but, in some of our States, made necessary by the constitution. Crim. Proced. I. § 650, 651; Cox *v.* The State, 8 Texas Ap. 254; Calvert *v.* The State, 8 Texas Ap. 538; The State *v.* Parker, 81 N. C. 531.

[4] 2 Chit. Crim. Law, 3–6; Archb. Crim. Pl. & Ev. 19th ed. 71; Rex *v.* Boucher, Trem. P. C. 150, 151.

[5] As to when the word should be in the singular and when in the plural, see Crim. Proced. I. § 605–607.

[6] Some variations from this form, and abridgments of it, do not render the conclusion ill. Ib. § 602–604; Whiting *v.* The State, 14 Conn. 487; People *v.* Winkler, 9 Cal. 234; Cross *v.* People, 47 Ill. 152; Coggins *v.* The State, 7 Port. 263; The State *v.* Click, 2 Ala. 26.

[7] Crim. Proced. I. § 650–652 *a*.

[8] Ib. § 429, 648.

[9] Ib. § 146, 652 *a*; 2 Chit. Crim. Law, 6; Archb. Crim. Pl. & Ev. 19th ed. 117; The State *v.* Smith, 13 Kan. 274; Commonwealth *v.* Stockley, 10 Leigh, 678; Commonwealth *v.* Feely, 2 Va. Cas. 1.

[10] Sneed *v.* People, 38 Mich. 248. I have not before me authorities to justify a more exact statement. All the English forms which I have observed, and a part of the American ones, have the prayer for process. I cannot see, in reason, why process, which issues on motion upon an indictment, may not be awarded in the same way upon an information. And, especially, if the defendant is in custody awaiting the criminal proceeding, or on bail awaiting it,

§ 69. **Prayer for Process.** — There is no precise form of words for it, but it may be, following in substance the English forms: —

Whereupon the said attorney-general [or district attorney] prays the consideration of the court here in the premises, and that due process of law may be awarded against him the said [defendant] in this behalf, to make him answer to the said State [*or* Commonwealth, *or* People of the said State] touching and concerning the premises aforesaid.[1]

IV. *The Indorsements.*

§ 70. **In General — Elsewhere.** — Under the differing legislation of our various States, there has ceased to be any uniformity in the indorsements required upon the indictment. The leading ones are explained in "Criminal Procedure."[2] There are statutes, in some of the States, providing for others.[3]

§ 71. **Printing.** — The prosecuting officer should consider carefully what ones are necessary in his State, and their forms, and have all printed[4] upon his blanks. As to —

§ 72. **The Method.** — There is no particular place upon the blank where the indorsements must, as of law, appear. If the names of the witnesses are required, ample space for them should be provided; and it will not be incorrect to let them follow, on the indictment, the printed word "Witnesses." As to the short indorsements, it will be specially convenient to put them upon the back, after the paper is folded and ready for the files of the court. A form for them employed in one of the districts of New York is given on the next page as suggestive. In the blank from which it was copied, the district attorney's name is printed, instead of leaving a space for it to be written. But in those States in which he is required to *sign* the indictment, no reason occurs to the writer why he may not *write* his name here, as such signing. Where a prosecutor's name is required to be indorsed, or any other short indorsement is provided for by

why pray for process which is neither needed nor expected?

[1] Archb. Crim. Pl. & Ev. 19th ed. 117; Crim. Proced. I. § 146 and note; 1 Chit. Crim. Law, 846, 847; 2 Ib. 6.

[2] Crim. Proced. I. § 690–704.

[3] The State *v.* Smouse, 50 Iowa, 43; The State *v.* Harris, 12 Nev. 414.

[4] Ante, § 51.

statute, the officer who prepares the blanks can find a place and method for it on the back.

COUNTY OF ALBANY.

Court of .....

THE PEOPLE

against

.....

INDICTMENT: MAYHEM.

.....

District Attorney.

A TRUE BILL.

.....

Foreman.

Filed	*day of*	188
Arraigned	*day of*	188
Plead	*Guilty.*	
Tried	*day of*	188

CHAPTER VI.

ALLEGATIONS IN THE BODY OF THE INDICTMENT COMMON TO ALL THE OFFENCES.

§ 73. **How Chapter divided.** — We shall consider, I. The Name and Addition of the Defendant; II. The Names of Third Persons; III. The Allegations of Time and Place.

I. *The Name and Addition of the Defendant.*

§ 74. **United.** — Though the Statute of Additions is not generally in force in our States,[1] or legislation has rendered harmless the non-observance of its forms, the pleader may like to see how the allegation under it should be; namely, —

John Jones, late of Chicago in the county of Cook, laborer;[2] —

Or, —

John Jones, late of Chicago in the county of Cook, laborer, otherwise called Billy Thompson [late of said Chicago, laborer];[3] —

Or, —

John Jones [&c. *as above*], and Jacob Roper, late of said Chicago, clerk, and Jane Roper, wife of said Jacob;[4] —

Or, where the indictment is against a married woman alone, —

[1] Crim. Proced. I. § 672–674.
[2] 1 Chit. Crim. Law, 176; 2 Ib. 1.
[3] The words in brackets are not required. Crim. Proced. I. § 681; 1 Chit. Crim. Law, 210, 211; 2 Ib. 2.
[4] 1 Chit. Crim. Law, 210, 211; 2 Ib. 2, 3.

Jane Roper, wife of Jacob Roper, of Chicago, in the county of Cook, clerk [the husband's addition].[1]

§ 75. **"Late of," &c.** — The expression "late of," adding the place of the commission of the offence instead of the actual domicil, is sufficient in law, it is convenient, and it is nearly universal in practice both in England and in our States.[2]

§ 76. **Name, if known — (Corporation).** — How the name is alleged when known we have just seen.[3] It should be the entire Christian and surname, and not the surname and the initial letter of the Christian name;[4] with the exception, it would appear, that the initials will suffice where the party has become commonly known by them.[5] How the name of a corporation is to be alleged when indicted we saw in another connection.[6] Now, —

§ 77. **Name unknown.** — If the name of the defendant is unknown, one practical method is to indict him by a wrong name; and he cannot avail himself of the defect without disclosing, in advance of his plea to the merits, a name to which he cannot avoid answering.[7] But ordinarily this is not necessary, and the allegation may be, for example, —

One Montgomery, &c. whose given name is to the jurors unknown;[8] —

Or, —

One whose surname is Montgomery, and the initial of his Christian name is C, but further it is to the jurors unknown;[9] —

Or, —

A man who was personally brought before the jurors by the keeper of the prison, and refused to disclose to them his name, and his name is to them unknown;[10] —

Or, —

[1] 2 Ib. 2; Lasington's Case, Cro. Eliz. 750; 2 Hawk. P. C. c. 23, § 124. See Rex *v.* Hurrell, Ryan & Moody N. P. 296.

[2] 1 Chit. Crim. Law, 209, 210; United States *v.* Wilcox, 4 Blatch. 385; The State *v.* Medbury, 3 R. I. 138; Ivey *v.* The State, 12 Ala. 276; Buckland *v.* Commonwealth, 8 Leigh, 732; The State *v.* Mulhisen, 69 Ind. 145; Cowley *v.* People, 21 Hun, 415; Myers *v.* People, 26 Ill. 173.

[3] Ante, § 74.

[4] Masters *v.* Carter, 4 Dowl. P. C. 577, 1 Har. & W. 672; Anderson *v.* Baker, 3 Dowl. P. C. 107.

[5] Crim. Proced. I. § 685, 686.

[6] Ib. § 682. And see post, § 79.

[7] Ib. § 675 *a*, 677, 756, 791–793; Plumley *v.* The State, 8 Texas Ap. 529; Alford *v.* The State, 8 Texas Ap. 545.

[8] Harris *v.* The State, 2 Texas Ap. 102, 106. And see Jones *v.* The State, 63 Ala. 27.

[9] And compare with Crim. Proced. I. § 678, 685.

[10] Crim. Proced. I. § 676.

A woman of medium height and weight, dark features, black hair, and a scar on the left cheek, whose name is to the jurors unknown.[1]

II. *The Names of Third Persons.*

§ 78. **Additions** — are not required to the names of third persons,[2] except where they constitute an element in the offence. Nor, in general, are they commonly given; though, quite appropriately, in special circumstances they are, even where not strictly required.

§ 79. **Names.** — When and what names of third persons should be averred is explained in other connections.[3] The forms of averment may be such as —

Edward Ferguson [*or* Edward Ferguson, clerk].[4]

Edward Ferguson, Jacob Jones, and John Hubbard. [*Not* Ferguson, Jones, & Co.[5]]

Edward Ferguson, Administrator of the estate of the late Richard Hopkins, deceased. [*Not* Richard Hopkins, unless he was living when the offence was committed.[6] But it is proper to say], —

The body of Richard Hopkins, then lately deceased.[7]

A certain person whose name is to the jurors unknown.[8]

An adult male white person whose name is to the jurors unknown.[9]

A certain male child then recently born of the said Jane, and not named.[10]

The Farmers' and Mechanics' National Bank of Buffalo [a corporation. *Or* a corporation called, &c.].[11]

III. *The Allegations of Time and Place.*

§ 80. **United.** — In ordinary cases, the time and place are alleged as follows: —

[1] And see, further, Ib. § 676–680; Justice *v.* The State, 17 Ind. 56; Alford *v.* The State, 8 Texas Ap. 545; Harwood *v.* Siphers, 70 Maine, 464.

[2] Crim. Proced. II. § 506, 718; 1 Chit. Crim. Law, 211.

[3] For example, Crim. Proced. I. § 104, 495, 546–552, 571–573, 581; II. § 62, 107, 137–139, 492, 493, 506–511, 718–726, 843, 890, 1006; Stat. Crimes, § 335, 428, 443, 457, 602, 603, 644, 672, 673, 894, 923, 944, 1037, 1120.

[4] 2 Chit. Crim. Law, 21 et seq.

[5] Crim. Proced. II. § 723.

[6] Crim. Proced. II. § 725. And see 3 Chit. Crim. Law, 964.

[7] 2 Chit. Crim. Law, 36; People *v.* Graves, 5 Parker C. C. 134.

[8] Archb. Crim. Pl. & Ev. 19th ed. 49; Crim. Proced. II. § 507; Edmonds *v.* The State, 34 Ark. 720.

[9] Rye *v.* The State, 8 Texas Ap. 153.

[10] Crim. Proced. II. § 510.

[11] On principle, and, it is believed, on the authorities, which still are somewhat indistinct and contradictory, it is sufficient

On the tenth day of June, in the year of our Lord one thousand eight hundred and eighty-three,[1] at[2] [the fifth ward of the city of[3]] New York, in the county of New York[4] [*or*, in some of our States, at the county of ——, *naming it, and not specifying the town.*[5]]

§ 81. **Time in Continuing Offences.** — If the offence, though in its nature continuing, admits of being perpetrated on a single day, and so the pleader may charge it either way at his election,[6] the writer deems it to be ordinarily the better practice to aver simply one day; unless a judgment of abatement is sought, and then only the continuing form will suffice. If alleged as on one day, the proofs may still be that it was continuing; that is, committed on any number of other days, the same as under the other form of allegation.[7] There is an exceptional doctrine to the contrary in Massachusetts; in which State, therefore, what is thus advised would not be practicable.[8] But however the practitioner may regard this suggestion, —

§ 82. **Never to be employed.** — The following form, not unfrequently found in the books, and in most circumstances not rendering the indictment bad, either because the uncertain days may be rejected as surplusage,[9] or because the courts do not deem it necessary to compel absolute accuracy, is not fit for practical use, so long as the language provides what is better: —

to state correctly the name of the corporation (which is an artificial person, Crim. Law, I. § 417), the same as in designating a natural person, without adding the matter here given in brackets. Crim. Proced. I. § 682 and notes; II. § 445, 455, 456; McCarney *v.* People, 83 N. Y. 408, 410, 411; Noakes *v.* People, 25 N. Y. 380; Murphy *v.* The State, 36 Ohio State, 628; Burke *v.* The State, 34 Ohio State, 79.

[1] Crim. Proced. I. § 389.

[2] It is immaterial whether the word here is "at" or "in." Ib. § 378.

[3] Quinlan *v.* People, 6 Parker C. C. 9; People *v.* Holmes, 6 Parker C. C. 25. Not used, except in a few cities such as New York and Albany.

[4] People *v.* Casey, 72 N. Y. 393; Baccigalupo *v.* Commonwealth, 33 Grat. 807; McDermott *v.* People, 5 Parker C. C. 102; People *v.* Sully, 5 Parker C. C. 142.

[5] Crim. Proced. I. § 370; The State *v.* Martin, 34 Ark. 340; Lowe *v.* The State, 4 Texas Ap. 34; Holoman *v.* The State, 2 Texas Ap. 610; The State *v.* Bowen, 16 Kan. 475; Wilkinson *v.* The State, 10 Ind. 372; The State *v.* Mulhisen, 69 Ind. 145; The State *v.* Roper, 1 Dev. & Bat. 208; Woody *v.* The State, 32 Ga. 595; Davis *v.* The State, 33 Ga. 98; Steerman *v.* The State, 10 Misso. 503; Norris *v.* The State, 25 Ohio State, 217; Henry *v.* The State, 35 Ohio State, 128; Davis *v.* Commonwealth, 13 Bush, 318; Williams *v.* The State, 42 Missis. 328; Newcomb *v.* The State, 37 Missis. 383.

[6] For example, Stat. Crimes, § 697, 703, 722, 734, 979.

[7] Crim. Proced. I. § 392, 393, 397; Cowley *v.* People, 83 N. Y. 464, 472, 8 Abb. New Cas. 1; The State *v.* Haley, 52 Vt. 476.

[8] Crim. Proced. I. § 402; Commonwealth *v.* Foley, 99 Mass. 499; Commonwealth *v.* Robinson, 126 Mass. 259; Commonwealth *v.* Elwell, 1 Gray, 463.

[9] Crim. Proced. I. § 388; Cook *v.* The State, 11 Ga. 53.

On the tenth day of March, in the year of our Lord one thousand eight hundred and eighty-three, and on divers other days and times between that day and the day of the [taking of this inquisition, *or*] finding of this indictment.[1]

§ 83. **Proper Forms.** — The pleader can select between the following, with or without slight variations, according to his taste and the nature of the particular case: —

On the tenth day of June, in the year of our Lord one thousand eight hundred and eighty-three, and thence continually until [the fourteenth day of August, in the same year, *or*, *what is best in most cases*] the day of the finding of this indictment.[2]

On [&c. *specifying a day, as above*], and on [each day from then until the finding of this indictment,[3] *or*] all the other days since, and up to the finding of this indictment.[4]

§ 84. **"Then and There."** — The common rule being that repetitions of time and place may be made by "then and there,"[5] we have not many authorities to the question whether the same will suffice after the allegations in the last two forms. That it will, after the former of them, is reasonably plain;[6] because there is one unbroken period, and the word "then" may as well indicate it where it exceeds twenty-four hours as where it does not. On the other hand, if two separate days have been mentioned, "then" can refer to only one; and, when it is uncertain to which one, the averment will be bad.[7] But is the second of the above forms to be interpreted as denoting separate days? Probably not; be-

[1] Crim. Proced. I. § 395; 2 Chit. Crim. Law, 39, 40, 47; Commonwealth *v.* Gallagher, 1 Allen, 592; Barth *v.* The State, 18 Conn. 432; The State *v.* Thomas, 50 Ind. 292; The State *v.* Stogsdale, 67 Misso. 630; The State *v.* Prescott, 33 N. H. 212; The State *v.* Boling, 2 Humph. 414; Smith *v.* Commonwealth, 6 B. Monr. 21; Commonwealth *v.* Ashley, 2 Gray, 356; Commonwealth *v.* Sullivan, 5 Allen, 511; The State *v.* Tracey, 12 R. I. 216; Rex *v.* Russell, 6 East, 427; United States *v.* Lumsden, 1 Bond, 5; The State *v.* Collins, 48 Maine, 217. A similar form, but worse, is, "on, &c., and on divers other days as well before as after that day." 2 Chit. Crim. Law, 68, 69, 73; Commonwealth *v.* McClanahan, 2 Met. Ky. 8; The State *v.* Spurbeck, 44 Iowa, 667.

[2] Crim. Proced. I. § 394; 2 Chit. Crim. Law, 48; 3 Ib. 577, 580, 583, 618; Commonwealth *v.* Kendall, 12 Cush. 414; Commonwealth *v.* Belding, 13 Met. 10. Practically, in a strictly continuing offence, and especially where an order for the abatement of a nuisance set out was to be asked, I should adopt this form, rejecting the words in brackets. And I see no reason why another form should be preferred in any case of a continuing offence.

[3] The State *v.* Odell, 42 Iowa, 75; The State *v.* Allen, 32 Iowa, 248.

[4] The State *v.* Freeman, 27 Iowa, 333. And see Commonwealth *v.* Walton, 11 Allen, 238; The State *v.* Way, 5 Neb. 283.

[5] Crim. Proced. I. § 407 et seq.

[6] Commonwealth *v.* Wood, 4 Gray, 11.

[7] 2 Hale P. C. 178; 1 Chit. Crim. Law, 218.

cause each day consists of a full twenty-four hours, and so this form also discloses no break. Still, there are various ways of avoiding the objection. In an indictment with no other specifications of time, the following will be plainly adequate: —

During the time [*or* times] aforesaid.[1]

§ 85. **Day of Week — (Sunday).** — Most of the indictments wherein the day of the week must be alleged[2] are, upon statutes, for violations of the Sabbath, Sunday, or Lord's Day, as the expression may be. It is practically best to employ the statutory term. And, where it is immaterial during what part of the twenty-four hours the act is done, the form may be, —

On [&c. *as in ordinary cases*,[3]] being Sunday [*or* being the Sabbath, *or* being the Lord's Day, *or* being the Lord's Day commonly called Sunday, *or* being the first day of the week commonly called Sunday].[4]

§ 86. **Hour of Day of Week.** — If the hour, as well as the day of the week, or otherwise the part of the day, is also material,[5] the expression will likewise preserve the statutory terms. It may, for example, be: —

On the fourteenth day of July, in the year of our Lord one thousand eight hundred and eighty-three, being Saturday, and after the hour of six o'clock in the afternoon of said day[6] [*or* being the Lord's Day, and between the midnight preceding and the midnight succeeding the said day.[7]]

Or, there may be circumstances in which the allegation supplementing that of the day of the week should be, —

During the time of divine worship.[8]

§ 87. **Night.** — If — as, for example, in burglary — the crime, or the degree of it for which a special punishment is sought to be inflicted, can be perpetrated only in the night, the indictment must lay it as in the night of the day.[9] And it is practically the

[1] 3 Chit. Crim. Law, 577. And see Ib. 664–667.

[2] Crim. Proced. I. § 399.

[3] Ante, § 80.

[4] 2 Chit. Crim. Law, 21, 25, and note; 3 Ib. 672; The State *v.* Parnell, 16 Ark. 506; Eitel *v.* The State, 33 Ind. 201; Carver *v.* The State, 69 Ind. 61; Albrecht *v.* The State, 8 Texas Ap. 313; Archer *v.* The State, 10 Texas Ap. 482; The State *v.* Meyer, 1 Speers, 305; The State *v.* Helgen, 1 Speers, 310; The State *v.* Baltimore, &c. Railroad, 15 W. Va. 362; Bridges *v.* The State, 37 Ark. 224; Reg. *v.* Cleworth, 4 B. & S. 927; Commonwealth *v.* Crowther, 117 Mass. 116.

[5] Crim. Proced. I. § 399.

[6] Commonwealth *v.* Colton, 8 Gray, 488.

[7] Commonwealth *v.* Wright, 12 Allen, 187.

[8] 2 Chit. Crim. Law, 27, 28.

[9] Crim. Proced. I. § 399; 2 Ib. § 131; Hall *v.* People, 43 Mich. 417.

safer way, and in some circumstances necessary, to add the hour, which may be, and commonly is, preceded by the word "about."[1] Thus, —

On the first day of June, in the year of our Lord one thousand eight hundred and eighty-three, about the hour of one in the night thereof.[2]

§ 88. **Negativing Limitations Bar.** — When the offence appears, *prima facie*, to be barred by the Statute of Limitations,[3] and it is desirable to negative the bar,[4] the matter should be alleged in accordance with the statutory terms. There are various methods; as, for example, follow the setting out of the offence in the ordinary way by —

After the commission of the said offence, as aforesaid, the said A [one of the defendants] was absent from the State for the period of five months, to wit, from, &c. to &c.; and the said B [another defendant] concealed himself from the aforesaid time of its commission for the space of two years until, &c. [but keeping within the terms of the particular statutory exception.][5]

Or, while the dates show no bar, if the pleader desires to forestall suspicion thereof, though unnecessarily, he may set forth the time of the offence as follows: —

On [&c. laying the time in the ordinary way], the same being within ten days next before the [presenting of this complaint, *or*] finding of this indictment.[6]

§ 89. **On High Seas and Abroad.** — There are various distinctions as to what will give jurisdiction to the courts of the United States over offences committed on the high seas and elsewhere outside of our territorial limits.[7] And the rule for the indictment is, that it must lay the place and the crime in a way to make the

[1] Crim. Proced. II. § 131–133 *a*.

[2] 3 Chit. Crim. Law, 1117; The State *v.* Clark, 42 Vt. 629; The State *v.* Jordan, 75 N. C. 27; Lyons *v.* People, 68 Ill. 271; Commonwealth *v.* Taylor, 5 Binn. 277; Rex *v.* Jones, 1 Leach, 4th ed. 537; Rex *v.* Compton, 7 Car. & P. 139; Rex *v.* Turner, 6 Howell St. Tr. 565; Johnson *v.* Commonwealth, 29 Grat. 796; The State *v.* Bartlett, 55 Maine, 200; Edwards *v.* The State, 62 Ind. 34; Bradley *v.* The State, 32 Ark. 704; Hamilton *v.* The State, 11 Texas Ap. 116; Hagar *v.* The State, 35 Ohio State, 268; Powell *v.* The State, 52 Wis. 217; The State *v.* Jones, 10 Iowa, 206; The State *v.* Hayden, 45 Iowa, 11.

[3] Stat. Crimes, § 257–267.

[4] Crim. Proced. I. § 405; Stat. Crimes, § 264.

[5] Ulmer *v.* The State, 14 Ind. 52; Stat. Crimes, § 261 *b*, 261 *c*; The State *v.* Meyers, 68 Misso. 266; Hansford *v.* The State, 54 Ga. 55.

[6] Reg. *v.* Cleworth, 4 B. & S. 927.

[7] See, in connection with the statutes, Crim. Law, I. § 109–123, 136–144, 182–186, 201, 202. And see post, § 879, note.

jurisdiction, equally with the wrongful act itself, *prima facie* appear.[1] Every allegation should conform to the combined law and facts of the individual case; for example, the following, when thus conforming, is correct: —

Upon the high seas, out of the jurisdiction of any particular State, in and on board a certain ship or vessel of the United States [the name whereof is to the jurors unknown, *or*] named the Mary Ann.[2]

§ 90. **Other Special Places.** — When, in other cases, a special locality is an element in the offence, it must be alleged. The occasions for the application of this rule are various, but attended by no such difficulties as to require forms to be given here.[3]

[1] Crim. Proced. I. § 45 et seq., 325, 364–376, 381, 384.

[2] United States *v.* Holmes, 5 Wheat. 412; United States *v.* Moulton, 5 Mason, 537; United States *v.* Palmer, 3 Wheat. 610; United States *v.* Plumer, 3 Clif. 28; Reg. *v.* Keyn, 13 Cox C. C. 403; Reg. *v.* Serva, 2 Car. & K. 53, 1 Cox C. C. 292; Reg. *v.* Menham, 1 Fost. & F. 369; Rex *v.* Hindmarsh, 2 Leach, 4th ed. 569; Rex *v.* Amarro, Russ. & Ry. 286; Rex *v.* Kidd, 14 Howell St. Tr. 123, 130. **Committed in a Foreign Country,** — see Reg. *v.* Sawyer, 2 Car. & K. 101.

[3] Harris *v.* The State, 50 Ala. 127; United States *v.* Jackson, 4 Cranch C. C. 483; The State *v.* Kaster, 35 Iowa, 221; Rex *v.* Pedly, 1 A. & E. 822; Rex *v.* White, 1 Bur. 333; Rex *v.* Brooks, Trem. P. C. 195; Reg. *v.* Mutters, Leigh & C. 491, 10 Cox C. C. 6; The State *v.* Hazle, 20 Ark. 156; Commonwealth *v.* Haynes, 2 Gray, 72; Commonwealth *v.* Goodnow, 117 Mass. 114; Commonwealth *v.* Wentworth, Brightly, 318; Commonwealth *v.* Waters, 11 Gray, 81. **Place, in State, under Jurisdiction of United States,** — United States *v.* Paul, 6 Pet. 141.

CHAPTER VII.

THE ALLEGATION OF A PREVIOUS OFFENCE RENDERING THE PRESENT MORE HEAVILY PUNISHABLE.

§ 91. **In General.** — As seen elsewhere, the statutes making a second or third offence punishable more heavily than the first are in terms quite diverse. Each practitioner, therefore, should specially note and follow what is enacted in his own State. But in every State the prior offence or conviction must in some form be alleged; for it is a fact indispensable to the heavier punishment to be inflicted.[1] Now, —

§ 92. **Prior Conviction.** — If, by the terms of the statute, or by its interpreted meaning,[2] there must be a conviction of the prior offence, either with or without sentence thereon,[3] before the second is committed, or before the prosecution therefor is begun, the fact to be alleged is, it is perceived, not *in pais*, but of judicial record. So that we are confronted with the question, which will several times arise in this volume, and upon which the authorities appear to be a little confused and uncertain, —

§ 93. **How is a Record Fact to be Alleged?** — On a question like this, the rules in criminal and civil causes are the same.[4] In early times, in both, pleaders commonly set out record facts in the plethoric terms of the extended record;[5] and so, in practice, they often do still, even where it is certain that so great fulness is not required. But some of the old cases have been overruled; and at present, and for a long time past, the prevailing doctrine in our States and in England has been and is, that a record fact

[1] Crim. Law, I. § 959–965; Stat. Crimes, § 981, 1044 *a*; Commonwealth *v.* Harrington, 130 Mass. 35; Johnson *v.* People, 55 N. Y. 512; Larney *v.* Cleveland, 34 Ohio State, 599.

[2] Stat. Crimes, § 240; 1 Hale P. C. 685, 686; ante, § 32.

[3] Stat. Crimes, § 348; Crim. Law, I. § 963.

[4] Crim. Proced. I. § 320, 321, 323, 325.

[5] Crim. Proced. II. § 906; Pitt *v.* Knight, 1 Saund. 86.

is not distinguishable from any other; and, like one resting in oral proofs, it may be alleged in any apt phrase which, in a manner not creating a variance,[1] fully covers the law relied on, and gives the other party adequate information of what he is to answer; rejecting such collateral and related facts as, by reason of their connection with those alleged, are indispensable parts of the evidence.[2] For example, a declaration in debt on a judgment may simply aver that, at a term and court named, the plaintiff, by the judgment [or by the consideration] of the said court, recovered against the defendant a sum specified, &c., for, &c. without any full setting out of the record.[3] So, in a suit for malicious prosecution, the record of the proceeding complained of and its termination may be similarly described in brief.[4] Where the record is of a court of inferior jurisdiction, the allegations must also show the jurisdiction; but on the question of the form and extent of them the authorities are discordant.[5] Of course, within this doctrine, there may be circumstances in which

[1] Ducommun *v.* Hysinger, 14 Ill. 249; Noyes *v.* Newmarch, 1 Allen, 51; Gulick *v.* Loder, 2 Green, N. J. 572; Hunt *v.* Middlesworth, 44 Mich. 448; Weber *v.* Fickey, 52 Md. 500.

[2] Saund. 6th ed. by Wms. 91 *a*, note, and the cases there cited; 1 Chit. Pl. 370; 2 Ib. 482 et seq.; Crim. Proced. II. § 346, 888, 897, 902, 904, 905, 911, 941, 943, 945, 1051; Rex *v.* Brooks, Trem. P. C. 175; Chittenden *v.* Catlin, 2 D. Chip. 22; Blizard *v.* Kelly, 2 B. & C. 283; Walker *v.* Play, 22 Ark. 103; Hamilton *v.* Lyman, 9 Mass. 14,17; Leland *v.* Kingsbury, 24 Pick. 315; Peebles *v.* Kittle, 2 Johns. 363; Lathrop *v.* Stuart, 5 McLean, 167.

[3] 7 Went. Pl. 79 et seq.; 1 Chit. Pl. 370, 371; Caldwell *v.* Richards, 2 Bibb, 331; Central Bank *v.* Veasey, 14 Ark. 671.

[4] 8 Went. Pl. 316; 2 Chit. Pl. 607; Peppet *v.* Hearn, 5 B. & Ald. 634; Gregory *v.* Derby, 8 Car. & P. 749; Leigh *v.* Webb, 3 Esp. 165; Hughes *v.* Ross, 1 Stew. & P. 258; Bacon *v.* Towne, 4 Cush. 217; Mills *v.* McCoy, 4 Cow. 406; Richards *v.* Foulks, 3 Ohio, 66; Johnson *v.* Browning, 6 Mod. 216.

[5] Richardson *v.* Hickman, 22 Ind. 244; Reeves *v.* Townsend, 2 Zab. 396; Van Etten *v.* Hurst, 6 Hill, N. Y. 311; People *v.* Weston, 4 Parker C. C. 226; Dakin *v.* Hudson, 6 Cow. 221; Bowman *v.* Russ, 6 Cow. 234; Holden *v.* Scanlin, 30 Vt. 177; Roys *v.* Lull, 9 Wis. 324; Currie *v.* Henry, 2 Johns. 433; Moseley *v.* White, 1 Port. 410; Beans *v.* Emanuelli, 36 Cal. 117; Wormer *v.* Smith, 2 Ind. 235; Rowley *v.* Howard, 23 Cal. 401. In 1 Saund. Wms. ed. 91 *a*, notes, the English doctrine is stated thus: "In pleading the judgments even of *inferior* courts, whether of record or not, it is now held not to be necessary to set out the cause of action, or that the defendant became indebted within the jurisdiction of the court; but it is sufficient to say that, at a certain court, &c. held at, &c. A. B. levied his certain plaint against C. D. in a certain plea of trespass on the case or debt, &c. (as the case may be), for a cause of action arising *within the jurisdiction* of the court, and thereupon such proceedings were had that afterwards, &c. it was considered by the said court that the said A. B. should recover against the said, &c." Referring to Rowland *v.* Veale, Cowp. 18, which also was recognized in Belk *v.* Broadbent, 3 T. R. 183, 185. This is the doctrine of a part of the American courts; and it is submitted that, in reason, no further allegation of jurisdictional facts should be required.

the exact words of a judicial record must be set out, just as there are in which oral words must be. An illustration of the latter is the action for slander;[1] of the former, the plea of former acquittal or conviction.[2] Hereupon —

§ 94. **Prior Conviction, again.** — Some appear to have deemed that a prior conviction for one offence, when charged in an indictment as ground for a heavier punishment of a subsequent one, must be set out in the same full and exact way as a former conviction of the same offence when pleaded in bar of a second indictment for it. On this idea rests the form next to be given. In any view, the jurisdiction of the convicting tribunal ought, if an inferior one, to be duly averred.[3] And there is doubtless no better practical method of doing this than by setting out whatever caption the prior record necessarily contains.[4] Where, besides the verdict or other conviction, the sentence is made also by law necessary to the heavier punishment, it must be averred. And so must anything else which the statute renders thus material.[5] The following, to be varied with the varying laws proceeded on, will suffice for illustration: —

The jurors [&c. ante, § 58], that heretofore, to wit, at a Court of General Sessions of the Peace holden in the city of New York, in and for the city and county of New York, on the sixth day of July in the year of our Lord one thousand eight hundred and fifty-three, before Welcome R. Beebe, Esquire, city judge and justice of the said court assigned to keep the peace of the said city and county of New York, A [ante, § 74], by the name and description of B [ante, § 74], was in due form of law tried and convicted of forgery upon a certain indictment then and there depending against the said A, by the name and description aforesaid; for that he, on [&c. setting out the entire former indictment]; and therefore it was considered by the said court then, that the said A, otherwise called B, should be imprisoned in the State prison for the term of eight years, as by the record thereof doth more fully appear. And the jurors aforesaid, now here sworn upon their oath aforesaid, do further present, that the said A, otherwise called B, having been so convicted of forgery, and having been duly discharged and remitted of such judgment and conviction, afterward,

[1] Gutsole *v.* Mathers, 1 M. & W. 495, and the cases there referred to; Wormouth *v.* Cramer, 3 Wend. 394; Taylor *v.* Moran, 4 Met. Ky. 127; Watson *v.* Mnsick, 2 Misso. 29; Parsons *v.* Bellows, 6 N. H. 289; Bassett *v.* Spofford, 11 N. H. 127. The rule is somewhat different in Massachusetts. Lee *v.* Kane, 6 Gray, 495.

[2] Crim. Proced. I. § 808, 810, 814–816.

[3] Ante, § 93; Crim. Law, I. § 962. Query whether the *dicta* in People *v.* Powers, 2 Seld. 50, do not go too far.

[4] Ante, § 53–56.

[5] Stevens *v.* People, 1 Hill, N. Y. 261.

to wit, on [&c. proceeding to set out the second offence precisely as if there had been no first].[1]

§ 95. **Further as to which.** — This particularity seems to have been deemed necessary in New York; and in England prior to the enactment of 7 & 8 Geo. 4, c. 28, § 11, in the year 1827.[2] In reason, the distinction under the common-law rules is as follows. The plea of *autrefois acquit* or *autrefois convict* should set out accurately and fully the former indictment; because the identity of the two offences is the very gist of it, and such identity cannot otherwise be made duly to appear. But if a statute simply declares a second conviction of forgery more heavily punishable than the first, no question of identity arises, and it is sufficient to allege the first in the briefest words which will adequately inform the defendant of what he has to answer. Not so was it under 5 Eliz. c. 14.[3] That statute created certain specific forgeries; and, being silent as to others, left them punishable at the common law.[4] Then, in § 7, it rendered more heavily penal a forgery of the specified kind when committed by one who had been before "convicted or condemned of any of the *offences aforesaid*, by any of the ways and means aforesaid;" not, the reader will note, convicted or condemned of any forgery, but of any of the forgeries particularized. Thereupon Hale well observes: "The indictment for a second offence must recite the record of the first conviction, *that it may appear to be a conviction of such a forgery as is within the statute*,"[5] — a reason which shows the like recital not to be necessary under statutes in the terms common in our States. Let the following, therefore, stand as an illustration of what is believed to be ordinarily sufficient with us, when so the interpreted[6] statute is covered: —

The jurors [&c. ante, § 58], that A [&c. ante, § 74], on, &c. at [&c. ante, § 80], was, by the name of A, &c. of, &c. duly convicted before Richard Roe, a justice of the peace having then and there competent

[1] This is the form in Cantor *v.* People, 5 Parker C. C. 217. For other like forms, see People *v.* Butler, 3 Cow. 347; Vincent *v.* People, 5 Parker C. C. 88, 15 Abb. Pr. 234; People *v.* Cæsar, 1 Parker C. C. 645; Gibson *v.* People, 5 Hun, 542; Archb. Forms (Am. reprint of 1828), 143, 152, 264; and see p. 295, 296; Reg. *v.* Page, 2 Moody, 219, 9 Car. & P. 756.

[2] See the places cited ante, § 94.

[3] Crim. Law, II. § 549–553.

[4] Ib. § 521; 1 Hawk. P. C. Curw. ed. p. 267 et seq.; Rex *v.* Ward, 2 Ld. Raym. 1461, 2 Stra. 747; Newman's Case, 3 Leon. 170.

[5] 1 Hale P. C. 686.

[6] Ante, § 32, 92.

authority in the premises, of the crime of drunkenness committed by the voluntary use of intoxicating liquor;[1] and, after said conviction, he, the said A, on, &c. at, &c. [proceeding to set out the second offence the same as if there had been no other].[2]

§ 96. **Simplified by Statute.** — In some of our States, and in England, statutes have permitted or required modifications of the common-law form. An English form under the later statutes[3] is the following: —

That A, &c. on, &c. [setting out the second offence in the ordinary way, as though there had been no other. Then proceed]: And the jurors aforesaid upon their oath aforesaid do further present, that heretofore and before the commission of the felony hereinbefore charged, to wit, at [describing the court wherein was the first conviction], on [adding the date], the said A was convicted of felony.[4]

§ 97. **Information for Further Sentence.** — When the proceeding is by information, while the prisoner is undergoing his punishment under the second conviction had without reference to the first,[5] the form, if so the statutory terms are covered, may be as follows: —

Be it remembered [&c. as at ante, § 60], that at [&c. setting out the court, the time, and the previous conviction and sentence, and the under-

[1] By the statute upon which the form here given is supposed to be drawn, "any person who shall be guilty of the crime of drunkenness, by the voluntary use of any intoxicating liquor, shall, for the first offence, be punished, &c., and, for any like offence committed after the first conviction, shall be punished," &c. R. S. of Mass. c. 130, § 18.

[2] I have here, in some degree, followed the form in Commonwealth *v.* Miller, 8 Gray, 484. See Stat. Crimes, § 981. And see Davis Prec. 39; The State *v.* Gorham, 65 Maine, 270; The State *v.* Dolan, 69 Maine, 573; The State *v.* Volmer, 6 Kan. 379.

[3] Crim. Law, I. § 964.

[4] Archb. Crim. Pl. & Ev. 19th ed. 1033. This form, in Archbold, proceeds further to say: "which said conviction is still in full force, strength, and effect, and not in the least reversed, annulled, or made void." But plainly this allegation is not necessary; for the indictment is required to set out only a *prima facie* case, and the reversal (see Hopkins *v.* Commonwealth, 3 Met. 460; Wilde *v.* Commonwealth, 2 Met. 408), if there has been one, is matter of defence. 1 Chit. Pl. 371; 1 Saund. Wms. ed. 330, note; Masterson *v.* Matthews, 60 Ala. 260; Stroup *v.* Commonwealth, 1 Rob. Va. 754. And indictments, omitting these words, have been sustained. Reg. *v.* Martin, 11 Cox C. C. 343; Reg. *v.* Page, 2 Moody, 219, 9 Car. & P. 756; Reg. *v.* Clark, Dears. 198, 6 Cox C. C. 210, 3 Car. & K. 367. In Reg. *v.* Christopher, Bell, 27, 8 Cox C. C. 91, the conviction was quashed simply because of a defect in the evidence. For further forms under the modern English statutes, see 2 Burn Just. 28th ed. Felony, vi.; Mat. Crim. Law, 483 &c. Nos. 161, 220, 225, 261; 6 Cox C. C. App. 6; Reg. *v.* Martin, supra; Reg. *v.* Christopher, supra; Reg. *v.* Garland, 11 Cox C. C. 224; Reg. *v.* Clark, supra; Reg. *v.* Thomas, Law Rep. 2 C. C. 141, 13 Cox C. C. 52; Reg. *v.* Fox, 10 Cox C. C. 502; Reg. *v.* Byrne, 4 Cox C. C. 248.

[5] Crim. Law, I. § 959.

going of the sentence if the statute renders it material]. And that afterward, at [&c. setting forth the second conviction and sentence in the same way]; in execution of which last-mentioned sentence the said [defendant] is now confined in the State prison, at, &c. And, further, that [if by the statute material], at the time of the finding and the trial of the indictment whereon was rendered the last-mentioned conviction and sentence, it was not known either to the grand jury or [1] to the attorney-general that the said [defendant] had been before convicted and sentenced as aforesaid. Wherefore the said attorney-general prays that the said [defendant] may be brought before this honorable court, and receive the further sentence by the statute in such case provided.[2]

[1] The conjunction here should be "or," not "and," within the rule stated Crim. Proced. I. § 591; Stat. Crimes, § 1043.

[2] Ross's Case, 2 Pick. 165; Commonwealth *v.* Mott, 21 Pick. 492.

CHAPTER VIII.

THE FORMS OF ALLEGATION AGAINST THE RESPECTIVE PARTICIPANTS IN ONE OFFENCE.

§ 98. **Scope of Chapter.** — The "Diagram of Crime" in "Criminal Law"[1] will, at a glance, convey a better idea of the scope of this chapter than a long explanation here would do. It appears in the vertical and nearly vertical lines, disregarding the horizontal. Beginning at the left hand and working to the right, —

§ 99. **How Chapter divided.** — We shall consider, I. The Attempt (represented by A B P); II. The Principals of the two Degrees and the two Accessories in Felony (represented by so much of B F L N O P as pertains to felony); III. The like Participants in other Crimes (represented by the rest of B F L N O P); IV. Compounding (represented by F G K L); V. Misprision (represented by G H K).

I. *The Attempt.*[2]

§ 100. **In General and how Indictment.** — An attempt consists of the two elements of an intent to commit a substantive offence, and a sufficient act done pursuant thereto yet falling short of the consummation meant.[3] And whether the wrong intended is treason, felony, or misdemeanor, the attempt is at the common law misdemeanor; but, in some of our States, there are statutes

[1] Crim. Law, I. § 602.

[2] For the law of attempt, see Crim. Law, I. § 723–772 *a*; for the pleading, practice, and evidence, see Crim. Proced. II. § 71–97.

[3] Crim. Law, I. § 727–729.

making particular attempts felony.[1] The indictment, therefore, is required simply to set out, in due form, the specific intent, and the act done pursuant thereto. The particulars of the substantive offence meant need not be given; because, not having been executed, there are no particulars.[2] Where the attempt is felony, the word "feloniously" should under the common-law rules be inserted in the proper place;[3] and, where the indictment is on a statute, the statutory terms should be duly followed.[4] But —

§ 101. **Local Differences.** — There are, on this subject, differences in our States, requiring the practitioner to acquaint himself with what is special to his own State. Thus, under the common-law rules, a count for a substantive felony and another for an attempt to commit it should not be inserted in one indictment, because felony and misdemeanor cannot at common law be joined; but such joinder is permissible under the present English statutes and those of many of our States.[5] And, —

§ 102. **Count for Attempt.** — Wherever the joinder is permissible, the pleader should take the precaution in all cases wherein by any probability the occasion for it may arise, to add to the counts for a substantive felony one for the attempt; or otherwise so to frame the allegations that there may be a conviction for the latter should the proofs of the former come short of showing its consummation. Now, —

§ 103. **Conspiracy,** — or some forms of it, may be properly regarded as attempt.[6] But our books do not treat of it under this head; so, passing it by, —

§ 104. **Three Sorts.** — There are, distinguishable as to the indictment, three sorts of attempt. They are, First, Solicitations; Secondly, The doing of what is in itself indictable, meaning it for a step in a heavier offence the consummation whereof fails; Thirdly, Acts in themselves less reprehensible, yet intended for steps in a crime which is not completed.[7]

§ 105. First. *Solicitations:*[8] —

[1] Ib. § 772.

[2] Reg. *v.* Quail, 4 Fost. & F. 1076; Commonwealth *v.* Doherty, 10 Cush. 52; Crim. Proced. II. § 76, 87.

[3] Crim. Proced. I. § 533–537.

[4] And see Crim. Proced. I. § 608–612; II. § 74–93.

[5] Ib. I. § 445, 446, 450, 451; Crim. Law, I. § 809.

[6] Crim. Law, II. § 191 et seq.

[7] Crim. Proced. II. § 73 et seq.

[8] Ib. § 74–76.

Described. — One, by soliciting another to commit a crime, does the full act which would cause him to be an accessory before the fact in felony, or a principal in treason or misdemeanor, should the other do it. If the latter declines, or endeavors and fails, the former is not thereby made innocent; this interruption of his plans simply renders it impossible he should be held as a principal, or as an accessory before the fact, in a substantive offence. His guilt has assumed the form of attempt.[1] Hence —

§ 106. **How the Indictment.** — The solicitation, which in this case is the act, is averred in the same or equivalent words[2] as in the indictment against an accessory before the fact. The setting out of the substantive offence intended may, as already explained, be less minute than is required in a charge of such offence as actually committed.[3] There is no one model whereon the allegations must necessarily be framed to be adequate; but the following, for example, will be found simple and plain: —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], intending to procure and cause [state the substantive offence meant], did then and there[4] [feloniously, &c.[5]] solicit and incite one X to [state what it was that X was solicited to do]; against the peace, &c. [ante, § 65–67].[6]

§ 107. **Particular Offences.** — Solicitations to particular offences

[1] Crim. Law, I. General Introduction, xxxv–xxxvii, in the notes; § 675, 767–768 *d*, 772 *a*.

[2] Post, § 114–117.

[3] Ante, § 100.

[4] These words "then and there" are quickly written and occupy but little space; so I insert them for caution. Yet I do not think that, in this form of allegation, they are necessary, though a slight change in the form might render them so. Commonwealth *v.* Doherty, 10 Cush. 52; Crim. Proced. I. § 408, 413; II. § 57.

[5] Say "feloniously" where the attempt is felony. Ante, § 100. And, if the indictment is on a statute, whether the attempt is felony or misdemeanor, add the statutory adverbs, adjectives, and the like.

[6] For forms, see 2 Chit. Crim. Law, 139, 480, 481, 482, 506, 542, 544; 3 Ib. 684, 693, 992, 993, 1129; Burn Just. Attempt; 6 Went. Pl. 385; Rex *v.* Devonshire, Trem. P. C. 188; Rex *v.* Montague, Trem. P. C. 209; Rex *v.* Goodman, 13 Howell St. Tr. 359, 360; Reg. *v.* Callingwood, 2 Ld. Raym. 1116, 6 Mod. 288; Rex *v.* Higgins, 2 East, 5; Rex *v.* Petitt, Jebb, 151; Rex *v.* Fuller, 2 Leach, 4th ed. 790; Reg. *v.* Welham, 1 Cox C. C. 192; Reg. *v.* Gregory, Law Rep. 1 C. C. 77, 10 Cox C. C. 459; Reg. *v.* Ransford, 13 Cox C. C. 9, 11 Eng. Rep 363; Reg. *v.* Most, 7 Q. B. D. 244, 14 Cox C. C. 583, 585; Reg. *v.* O'Callaghan, 14 Cox C. C. 499; Reg. *v.* Clement, 26 U. C. Q. B. 297.

Maine. — The State *v.* Ames, 64 Maine, 386.

Massachusetts. — Commonwealth *v.* Jacobs, 9 Allen, 274.

Michigan. — People *v.* Thompson, 37 Mich. 118.

New York. — People *v.* Bush, 4 Hill, N. Y. 133.

Pennsylvania. — Smith *v.* Commonwealth, 4 Smith, Pa. 209.

United States. — United States *v.* Lyles, 4 Cranch C. C. 469.

will be considered under the titles of the offences themselves.

§ 108. Secondly. *The doing of what is in itself indictable, meaning it for a step in a Heavier Offence the consummation whereof fails: —*

Elsewhere. — The rules for the indictment under this head are pretty fully stated in "Criminal Procedure."[1] And, in this volume, under the titles of some of the minor offences, particularly Assault and Battery, the form for alleging the intent to commit a heavier crime will be given.

§ 109. **How the Indictment.** — The indictment is simple; namely, it sets out the lighter offence as though it was the only thing complained of, and adds the intent to commit the heavier. The following is an adequate formula: —

That A, &c. [alleging the minor offence, with time and place, in the same way as though it alone was being proceeded against,[2] and continue] with the intent then and there[3] to [specifying the ulterior crime meant, as already[4] explained]; against the peace, &c. [ante, § 65–67].[5]

§ 110. Thirdly. *Acts in themselves less reprehensible, yet intended for steps in a Crime which is not completed:*[6] —

The Indictment — under this head has the allegation, already explained, of a specific intent to do the substantive wrong.[7] And it further sets out any act or acts toward it which, combined with the intent, will *prima facie* make the transaction indictable as an attempt.[8] The law, as to what acts will suffice, is a little uncertain and variable;[9] and the obscurities and con-

[1] Crim. Proced. II. § 77–85.

[2] "Feloniously." — I think the common-law rules, not in force in all the States, make to this a single exception. Where the minor offence is a misdemeanor, and the statute elevates it to a felony when committed with the intent to inflict the higher wrong, it should be alleged to have been done feloniously; as, "did *feloniously* make an assault," not simply "did make an assault."

[3] As to "then and there," see ante, § 106; Commonwealth *v.* Doherty, 10 Cush. 52.

[4] Ante, § 100, 106.

[5] For forms, see the places mentioned and referred to ante, § 111. I insert here, for convenience, a few particular references: 3 Chit. Crim. Law, 798, 807, 828, 829, 862, 1096; Reg. *v.* Furguson, Dears. 427, 6 Cox C. C. 454, 29 Eng. L. & Eq. 536; Reg. *v.* Douglas, Car. & M. 193; Reg. *v.* Cramp, 5 Q. B. D. 307, 14 Cox C. C. 401; Henshall's Case, 2 Lewin, 135; People *v.* Pettit, 3 Johns. 511; Davis *v.* The State, 3 Har. & J. 154; People *v.* Girr, 53 Cal. 629; The State *v.* Painter, 67 Misso. 84; Dickinson *v.* The State, 70 Ind. 247, 250; Commonwealth *v.* Nutter, 8 Grat. 699; Cole *v.* The State, 10 Eng. 318; Harrison *v.* The State, 2 Coldw. 232; Reg. *v.* Brown, 10 Q. B. D. 381.

[6] Crim. Proced. II. § 86–93.

[7] Ante, § 100, 106, 109.

[8] Crim. Proced. II. § 86.

[9] Crim. Law, I. § 724, 725, 737–766, 769.

flicts extend equally, and perhaps further, into the form of the indictment.[1]

§ 111. **Formula.** — There is no one formula for the indictment which is indispensable. The following is simple, convenient, and sufficient: —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80] intending to [state the substantive offence meant] did then and there[2] [feloniously, &c.[3]] *thrust his hand*, &c. [proceeding to particularize, *or* otherwise show what he did; and close as directed ante, § 106].

Or, the order of the averments may be reversed; thus, —

That A, &c. on, &c. at, &c. did [say what], with the intent then and there to, &c. [setting out what substantive offence was meant; and close as before directed].[4]

[1] Crim. Proced. II. § 87–91.

[2] "Then and there" probably not necessary. See ante, § 106 and note, 109.

[3] See the note, ante, § 106.

[4] For forms, see Crim. Proced. II. § 87–91; Stat. Crimes, § 752, 758 *a*; 2 Chit. Crim. Law, 162, 169, 493; 3 Ib. 696, 795, 796, 797, 798, 817, 846, 981, 984, 1050, 1131, 1132, 1133, 1134; 4 Went. Pl. 58, 59, 60; 5 Cox C. C. App. 92; 6 Ib. App. 45, 46, 61, 67, 68, 107, 108, 109; Rex *v.* Giles, 7 Howell St. Tr. 1129; Reg. *v.* Burgess, Leigh & C. 258, 9 Cox C. C. 247; Reg. *v.* Collins, Leigh & C. 471, 9 Cox C. C. 497; Reg. *v.* Johnson, Leigh & C. 489, 10 Cox C. C. 13; Rex *v.* Roberts, Dears. 539, 7 Cox C. C. 39, 33 Eng. L. & Eq. 553; Reg. *v.* Garrett, Dears. 232, 22 Eng. L. & Eq. 607; Reg. *v.* Marsh, 1 Den. C. C. 505, 3 Cox C. C. 570; Reg. *v.* Kealey, 2 Den. C. C. 68, 70, 5 Cox C. C. 193; Rex *v.* Shannon, Jebb, 209; Reg. *v.* Henshaw, Leigh & C. 444, 9 Cox C. C. 472; Sinclair's Case, 2 Lewin, 49; Rex *v.* Butler, 6 Car. & P. 368; Reg. *v.* Martin, 9 Car. & P. 215; Reg. *v.* St. George, 9 Car. & P. 483; Reg. *v.* Lewis, 9 Car. & P. 523; Reg. *v.* March, 1 Car. & K. 496; Reg. *v.* James, 1 Car. & K. 530; Reg. *v.* Perry, 2 Cox C. C. 223; Reg. *v.* Donovan, 4 Cox C. C. 399; Reg. *v.* Jarman, 14 Cox C. C. 111; Reg. *v.* Burton, 13 Cox C. C. 71, 13 Eng. Rep. 418.

Alabama. — The State *v.* Clarissa, 11 Ala. 57.

Arkansas. — Sullivant *v.* The State, 3 Eng. 400.

Connecticut. — The State *v.* Wilson, 30 Conn. 500.

Georgia. — Griffin *v.* The State, 26 Ga. 493; Black *v.* The State, 36 Ga. 447; Gibson *v.* The State, 38 Ga. 571.

Indiana. — McMillen *v.* The State, 60 Ind. 216.

Massachusetts. — Commonwealth *v.* Harney, 10 Met. 422; Commonwealth *v.* Flynn, 3 Cush. 529; Commonwealth *v.* McDonald, 5 Cush. 365; Commonwealth *v.* Galavan, 9 Allen, 271; Commonwealth *v.* Sherman, 105 Mass. 169; Commonwealth *v.* McLaughlin, 105 Mass. 460; Commonwealth *v.* Fortune, 105 Mass. 592; Commonwealth *v.* Bearse, 108 Mass. 487; Commonwealth *v.* Wunsch, 129 Mass. 477.

Michigan. — McDade *v.* People, 29 Mich. 50.

Mississippi. — Sarah *v.* The State, 28 Missis. 267.

Missouri. — The State *v.* Anderson, 19 Misso. 241; The State *v.* Matthews, 20 Misso. 55; The State *v.* McDonald, 67 Misso. 13, 15; The State *v.* Craft, 72 Misso. 456.

North Carolina. — The State *v.* Welsh, 3 Hawks, 404.

New York. — Peverelly *v.* People, 3 Parker C. C. 59, 61; La Beau *v.* People, 6 Parker C. C. 371.

Pennsylvania. — Hackett *v.* Commonwealth, 3 Harris, Pa. 95.

Texas. — The State *v.* Franks, 38 Texas, 640; The State *v.* Williams, 41 Texas, 98; Shepherd *v.* The State, 42 Texas, 501;

§ 112. **Elsewhere.** — Descending to particulars, the form for the attempt to commit each substantive offence will be given under the title of the offence itself.

II. *The Principals of the Two Degrees and the Two Accessories in Felony.*[1]

§ 113. **One Count — (Or Separate Indictments).** — All the participants in a felony — namely, the principal of the first degree, the principal of the second degree, the accessory before the fact, and the accessory after — are felons.[2] They may be indicted separately or together; if the latter, there need not and properly should not be a separate count for each, but all are charged, each in a form appropriate to his act of participation, in the same count.[3] Thus, —

§ 114. **Formula for One Count against All.** — If all are charged together, the formula, drawn after the common-law rules, is as follows: —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], feloniously did, &c. [setting out a felony as though committed by A alone, but not adding the conclusion. Then proceed against the principal of the second degree thus:] And that B, &c. [ante, § 74–77] was then and there, at the commission of said felony, feloniously present, aiding, inciting, and abetting the said A therein. [Still stopping short of the conclusion, charge next an accessory, better the accessory before the fact, thus:] And that, before the commission of the said felony, C, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did feloniously counsel, aid, incite, and procure the said A [*or* the said B, *or* the said A and B[4]] to commit, in manner and form aforesaid, the said felony. [Still stopping short of the conclusion, proceed as follows against the accessory after the fact:] And that D, &c. [ante, § 74–

Watson *v.* The State, 9 Texas Ap. 237, 242.

Virginia. — Uhl *v.* Commonwealth, 6 Grat. 706; Christian *v.* Commonwealth, 23 Grat. 954.

United States. — United States *v.* Worrall, 2 Dall. 384.

[1] Crim. Law, I. § 646–654, 660–680, 692–700 *a*; Crim. Proced. II. § 3–11.

[2] Crim. Law, I. § 646, 673, 700 *a*.

[3] Crim. Proced. I. § 467, 468; II. § 5, 8, 9, 11. We sometimes meet with indictments wherein the different participants appear to be charged in distinct counts. Reg. *v.* Brannon, 14 Cox C. C. 394. Doubtless such an indictment is not ill; because, among other reasons, all the conclusions but the one to the last count may be rejected as surplusage, and then there is but one count. And see Commonwealth *v.* Chiovaro, 129 Mass. 489.

[4] Doubtless, if the averment is of an enticement of A *and* B, proof of either alone will be competent and sufficient. Crim. Proced. II. § 60.

77], after the commission of the said felony, on, &c. at, &c. [ante, § 80], well knowing the said A [*or* the said B, *or* the said C, *or* the said A, B, and C] to have committed and procured the commission of the same in manner and form aforesaid, him the said A [*or* B, &c. as above] did feloniously receive, harbor, and maintain; against the peace, &c. [concluding as in any other single count, ante, § 65–69].[1]

§ 115. **Principal of Second Degree.** — Not often will the pleader elect to charge one as principal of the second degree; because, since this participant can be equally well convicted on an allegation of being the actual doer, or principal of the first degree,[2] the latter method will ordinarily be deemed the more convenient. But, if the former is adopted, the form appears in the last section; or, to copy more nicely the precedents in our books, it is —

That A, &c. [the principal of the first degree, setting out the felony against him down to but not including the conclusion]. And [the jurors aforesaid, upon their oath aforesaid, do further present[3]], that B, &c. [ante, § 74–77] *on the day and year aforesaid*,[4] [with force and arms[5]] at the [place] aforesaid, in the county aforesaid, feloniously was present, aiding, abetting, and assisting the said A the [felony and larceny] aforesaid to do and commit; against the peace, &c. [ante, § 65–69].[6]

§ 116. **Accessory before the Fact.** — The ordinary principles of the common law, as applied in all its departments except in felony, and under the statutes of some of the States in felony

[1] The precedents in the books are all, or nearly all, more or less encumbered by verbiage; but, excluding it, this formula conforms in substance to them; though, in non-essentials, they differ in various degrees from it, and equally from one another. Some of the common forms appear in the remaining sections of this sub-title, and others are referred to in the notes to them.

[2] Crim. Law, I. § 648; Crim. Proced. II. § 3; Sharp *v.* The State, 6 Texas Ap. 650; Raiford *v.* The State, 59 Ala. 106; The State *v.* O'Neal, 1 Houst. Crim. 58.

[3] This repetition of the commencement is common, but not universal, in our books of precedents and in actual practice. It is never necessary, except as introducing a new count. Crim. Proced. I. § 429; II. § 5.

[4] Instead of these italic words, which perhaps are legally sufficient, it is neater and safer to say "then and there," as in 2 Chit. Crim. Law, 4. See Crim. Proced. I. § 412.

[5] Not necessary. Ante, § 43.

[6] Archb. Pl. & Ev., compare the various editions, the pages of which differ; as, 6th Eng. ed. 681, 13th, 797. For other forms, see 3 Chit. Crim. Law, 753, 755, 761, 762, 787, 792, 855, 973, 979; 6 Cox C. C. App. 100; Parker's Case, 2 Dy. 186 *a*; Rex *v.* Atkins, 7 Howell St. Tr. 231; Rex *v.* White, 17 Howell St. Tr 1079; Mackalley's Case, 9 Co. 61 *b*, 62 *b*; Rex *v.* Doughty, Trem. P. C. 285; Rex *v.* Taylor, 1 Leach, 4th ed. 360; Rex *v.* Potts, Russ. & Ry. 353; Rex *v.* Folkes, 1 Moody, 354; Reg. *v.* O'Brian, 1 Den. C. C. 9, 2 Car. & K. 115, 1 Cox C. C. 126; Reg. *v.* Brady, Jebb. 257; Reg. *v.* Pym, 1 Cox C. C. 339; Reg. *v.* Crisham, Car. & M. 187; Reg. *v.* Downing, 2 Car. & K. 382; The State *v.* Hopper, 71 Misso. 425, 427; The State *v.* Rabon, 4 Rich. 260.

also, would permit the accessory before the fact to be charged as principal, in the same manner as may be the principal in the second degree.[1] But a technical rule of the common law, extending only to felony, has forbidden this; so that, in the absence of any interposing statute, the allegation against such accessory must be special.[2] The course is to set out, first, the offence of the principal, and then the counselling of the accessory. The form already given in outline will, if detached from the rest, suffice;[3] or, as commonly appearing in our books of precedents, it is as follows: —

That A, &c. [the principal, setting out his felony in full, except the conclusion]. And [the jurors aforesaid upon their oath aforesaid do further present[4]], that B, &c. [ante, § 74–77] before the said felony [*or* felony and murder, *or* burglary, &c. as the case is] was committed in form aforesaid, to wit, on, &c., [with force and arms[5]] at, &c., did unlawfully and feloniously counsel, aid, abet, and procure [*or*, if for murder, did feloniously and maliciously incite, move, procure, aid, counsel, hire, and command] the said A to do and commit the said felony [*or* the said felony and murder] in manner and form aforesaid; against the peace, &c. [ante, § 65–69].[6]

[1] Crim. Law, I. § 673, 674, 680, 685; Crim. Proced. I. § 57, 332; II. § 4.

[2] Crim. Law, I. § 663; Crim. Proced. II. § 7–9.

[3] Ante, § 114.

[4] Unnecessary, yet harmless. Ante, § 115, note.

[5] Unnecessary. Ante, § 43.

[6] 2 Chit. Crim. Law, 5. For other forms, see Archb. Crim. Pl. & Ev. 13th ed. 802; 3 Chit. Crim. Law, 1118; 6 Cox C. C. App. 101; Rex *v.* Atkins, 7 Howell St. Tr. 231; Parker's Case, 2 Dy. 186 *a*; Reg. *v.* Saunders, 2 Plow. 473; Rex *v.* Dannelly, Russ. & Ry. 310; Rex *v.* Foy, Vern. & S. 540; Rex *v.* Scott, 1 Leach, 4th ed. 401; Rex *v.* Blackson, 8 Car. & P. 43; Reg. *v.* Greenwood, 23 U. C. Q. B. 255. **Foreign Country.** — Against the accessory to a fact committed in a foreign country. Reg. *v.* Bernard, 1 Fost. & F. 240, 243. **Different Counties.** — Where the accessorial act is in one county, and that of the principal is in another, if the law requires the accessory to be indicted in the former county (Crim. Proced. I. § 58), the form in the text may be employed the same as in other cases. But the locality of the respective offences should be laid, according to the fact, each in its proper county. Sanchar's Case, 9 Co. 117 *a*, 118 *a*; Admiralty Case, 13 Co. 51; Reg. *v.* Saunders, 3 Dy. 254 *a*.

Georgia. — Loyd *v.* The State, 42 Ga. 221.

Maine. — The State *v.* Carver, 49 Maine, 588.

Massachusetts. — Commonwealth *v.* Glover, 111 Mass. 395; Commonwealth *v.* Adams, 127 Mass. 15; Commonwealth *v.* Chiovaro, 129 Mass. 489.

New York. — People *v.* Hartung, 4 Parker C. C. 256.

Nevada. — The State *v.* Chapman, 6 Nev. 320.

Ohio. — Hartshorn *v.* The State, 29 Ohio State, 635.

Pennsylvania. — Commonwealth *v.* Kaas, 3 Brews. 422. And see Brandt *v.* Commonwealth, 13 Norris, Pa. 290.

Texas. — Cohea *v.* The State, 11 Texas Ap. 622. And see McKeen *v.* The State, 7 Texas Ap. 631.

Virginia. — Hawley *v.* Commonwealth, 1 Mat. 847.

§ 117. **Same after Conviction of Principal.** — It is reasonably plain that, though the principal has been convicted, the foregoing form will still suffice against the accessory before the fact.[1] But for obvious reasons it is convenient, and it has been the custom, to allege such conviction; nor, under the common-law rules, need the principal's guilt be also averred in this case.[2] The following is the form: —

That heretofore, at, &c. [setting out the court and the time of holding it], one A, of, &c. was by the name of A, of, &c. duly convicted for that, &c. [reciting the indictment].[3] And that B, of, &c. [ante, § 74–77], before the said felony was by the said A committed in form and manner aforesaid, on, &c. at, &c. [ante, § 80], did feloniously and maliciously incite, procure, counsel, hire, and command the said A in form and manner aforesaid to do and commit the said felony; against the peace, &c. [ante, § 65–69].[4]

§ 118. **Accessory after the Fact.** — On the principles of our law, as appearing in other parts of it, the accessory after the fact, unlike the accessory before,[5] could neither be charged as principal nor even be joined with him in the same count.[6] Yet a technical rule of the common law permits the latter, but requires the allegation to be special, in exact analogy to the proceedings against the accessory before the fact.[7] The form has already been given;[8] or, as commonly appearing in our books of precedents, it is, rejecting the ordinary surplusage, as follows: —

[After stating the guilt or conviction of the principal, as in ante, § 116 or 117, proceed:] And that B, &c. [ante, § 74–77] afterward, on, &c. at, &c. [ante, § 80], well knowing the said A to have done and committed the

[1] Crim. Law, I. § 667.

[2] Crim. Proced. II. § 11.

[3] There are differences of opinion, and some uncertainties, as to what this part of the indictment should contain. The question, with forms, is considered ante, § 93–96. And see Reg. *v.* Butterfield, 2 Moody & R. 522, 1 Cox C. C. 39. In Archb. Crim. Pl. & Ev. 10th Eng. ed. 689, the conviction of the principal is alleged as follows: —

"Middlesex, to wit: — The jurors for our lady the Queen upon their oath present, that heretofore, to wit, at the general sessions of the delivery of the jail of, &c. &c. — [so continuing the caption of the indictment against the principal,] — it was presented upon the oaths of, &c., that one J. S., late of &c. — [continuing the indictment to the end, reciting it however in the past, and not in the present tense]; upon which said indictment the said J. S., at the session of the jail delivery aforesaid, was duly convicted of the [felony and larceny] aforesaid: as by the record thereof more fully and at large appears."

[4] Reg. *v.* Read, 1 Cox C. C. 65; Reg. *v.* Butterfield, 1 Cox C. C. 39; 2 Morris St. Cas. App. 1760.

[5] Ante, § 116.

[6] Crim. Law, I. § 642, 692. See post, § 119.

[7] Crim. Law, I. § 692; Crim. Proced. I. § 467; II. § 7–11.

[8] Ante, § 114.

said felony and burglary [according to the fact] in form aforesaid, did feloniously receive, harbor, and maintain[1] him the said A; against the peace, &c. [ante, § 65–69].[2]

III. *The like Participants in other Crimes.*[3]

§ 119. **Option to follow Foregoing — (Exception as to Receivers).** — Since the pleader has the option, if he deems practically best, to set out in an indictment the facts according to their outward form rather than their legal effect,[4] it follows that in misdemeanor and treason, wherein all inciters, whether present or absent, are by legal construction of their act doers,[5] a count is sufficient which charges the respective participants at and before the fact after the rules laid down in the last sub-title.[6] But as in cases other than felony,[7] — at least, as in misdemeanor, the law in treason being less certain and settled, — the offence of the helper after the fact who incurs any guilt is separate and not parcel of the principal's, the two cannot in reason be joined in one count, whatever be the rule as to joining them in one indictment in separate counts. And the charge against such helper must, of course, be special.[8] Hence, —

§ 120. **Present Aiding or Counselling.** — One present aiding or

[1] On the question whether time and place should be repeated to this allegation, see ante, § 106, note.

[2] In substance, but with a transposition, as in 2 Chit. Crim. Law, 5. This precedent in Chitty, and the same in various other places in our books, after charging the felony of the principal, proceeds: "That B, &c. well knowing the said A to have, &c. afterwards, to wit, on, &c. at, &c. him the said A did feloniously receive," &c. Now, to constitute the offence of B, the knowledge of A's felony must have existed simultaneously with the receiving; but, in this form, it is not so charged, nor is there any allegation of time and place to it. There is simply an averment that the receiving was "after" the knowledge; and so, perhaps, the continuance of the knowledge may be inferred. I could not say that a particular court will not accept this as sufficient, especially in deference to long usage. But it is better in pleading to avoid objections of this sort, when it can be so easily done as in this instance. For other forms, see Parker's Case, 2 Dy 186 *a*; Rex *v.* Atkins, 7 Howell St. Tr. 231; Reg. *v.* Swendsen, 14 Howell St. Tr. 559; Rex *v.* Farringdon, Trem. P. C. 250; Rex *v.* Blackson, 8 Car. & P. 43; 6 Cox C. C. App. 101; Reg. *v.* Hansill, 3 Cox C. C. 597; Reg. *v.* Richards, 2 Q. B. D. 311, 13 Cox C. C. 611; Reg. *v.* Hancock, 14 Cox C. C. 119.

Georgia. — Bieber *v.* The State, 45 Ga. 569.

Ohio. — Hallett *v.* The State, 29 Ohio, 168, 169.

Texas. — Poston *v.* The State, 12 Texas Ap. 408.

Virginia. — Wren *v.* Commonwealth, 25 Grat. 989, 991.

[3] Crim. Law, I. § 655–659, 681–689, 701–708; Crim. Proced. II. § 2.

[4] Crim. Proced. I. § 332–335.

[5] Ante, § 116; Crim. Law, I. § 655, 656, 681–686.

[6] Crim. Proced. II. § 2.

[7] Ante, § 118.

[8] Ib.; Crim. Law, I. § 701–707.

counselling in these offences may be charged in either of the two forms permissible in felony.[1] To repeat here a form of the indictment would be of no practical service.[2]

§ 121. **Inciting, but Absent.** — A person who has incited another to one of these offences, but was absent at its commission, may be indicted after the form against the accessory before the fact, substituting[3] "maliciously" in misdemeanor, or "traitorously" in treason, for "feloniously";[4] or, at the election of the pleader, he may be charged directly as doer.[5] The forms for this, therefore, appear in other connections, and are not here required.

§ 122. **Aiding after Fact.** — From explanations in "Criminal Law,"[6] the reader will be satisfied that he will probably never have occasion to prosecute or defend an abettor after the fact in treason or misdemeanor. Hence, as the books appear to furnish us no precedents for these indictments, the present writer does not deem it incumbent on him to construct never-to-be-called-for forms.

IV. *Compounding.*[7]

§ 123. **As to Accessorial, &c.** — The chief difference between the compounder of an offence and an accessory after the fact in felony is, that the guilt of the former is less intense than of the latter; he may be prosecuted in advance of the principal, and his crime is never felony but always misdemeanor.[8] Therefore the indictment charges, first, the offence compounded, and then the defendant's act of compounding it. Thus, —

§ 124. **Formula for Indictment.** — The indictment may be, —

That A, &c. on, &c. at, &c. [ante, § 74], did, &c. [setting out his offence as directed, ante, § 116–118, 121], against the peace, &c. [ante, § 65–69]; and that afterward B, of, &c. [the defendant], on, &c. at, &c. did, well knowing the premises and the guilt of the said A therein, take and receive of the said A the sum of, &c. in consideration whereof he, the

[1] Ante, § 114, 115.

[2] **Conspiracy and Tumult.** — For a form for stimulating a conspiracy and tumult, see Rex *v.* Hanson, 31 Howell St. Tr. 1.

[3] Crim. Proced. I. § 533–537.

[4] Ante, § 116, 117. **County.** — The county will not be that of the incitement, but of the doing. Crim. Proced. I. § 53, 57.

[5] Crim. Proced. II. § 2; Crim. Law, I. § 682–686.

[6] Crim. Law, I. § 701–708.

[7] Crim. Law, I. § 709–715. And see Ib. § 247, 267–276, 604, 699; Crim. Proced. I. § 404.

[8] Crim. Law, I. § 709, 710.

said B, did while so taking and receiving it there promise to and agree with the said A, that he would not thereafter prosecute *or*[1] appear against him the said A by reason of his aforesaid offence, but would and thereby did compound the same; against the peace, &c.[2]

§ 125. **Fuller and Common Forms.** — Most of the forms in our books are expressed somewhat differently from the foregoing, and are more extended. Thus, one of Chitty's is —

That heretofore, to wit, on, &c. at, &c. one A [with force and arms[3]] feloniously did steal, take, and carry away one lamp, of the value of twenty shillings, of the goods and chattels of one X, late of, &c. against the peace, &c.; and that B, &c. [the defendant], well knowing the premises, and the said felony to have been by the said A so as aforesaid done and committed, [but contriving and intending unlawfully and unjustly to pervert the due course of law in this behalf, and to cause and procure the said A for the felony aforesaid to escape with impunity[4]], afterwards, to wit, on, &c. with force and arms, at, &c. unlawfully [and for wicked gain's sake[5]] did compound the said felony with the said A, and did on said last-mentioned day there exact, receive, and have of the said A the sum of eighteen shillings [in moneys numbered[6]] for and as a reward for compounding the said felony and desisting from all further prosecution against the said A for the said felony, [and that the said B, on, &c. last aforesaid, at, &c. aforesaid, did thereupon desist, and from that time hitherto hath desisted, from all further prosecution of the said A for the said felony, to the great hindrance of justice, in contempt, &c. and[7]] against the peace, &c.[8]

[1] This is one of those exceptional cases wherein *or* is proper in allegation, not *and*. Crim. Proced. I. § 591; Stat. Crimes, § 1043.

[2] As a question of principle, an indictment on this formula will be adequate. But the next three sections disclose, that the common forms are more voluminous. The decisions are not sufficiently numerous to render it certainly safe, before every court, to reject all the customary verbosity. For other and the more common forms, see 2 Chit. Crim. Law, 220 et seq.; 2 Burn Just. 832; Mat. Crim. Law, 450; 4 Went. Pl. 327, 329; Davis Prec. 97, 98; Reg. *v.* Mabey, 37 U. C. Q. B. 248. **Misdemeanor.** — The form in Reg. *v.* Mabey, supra, is for compounding a misdemeanor. **Inciting.** — For prevailing on a victim of rape to compound it with the offender, who was imprisoned and about to be prosecuted, see 2 Chit. Crim. Law, 221. **Conspiracy and Compounding.** — For conspiring to charge a man with receiving stolen goods and thereby obtaining money for compounding the offence, &c., 3 Chit. Crim. Law, 1182.

[3] Unnecessary. Ante, § 43.

[4] These words seem not to be necessary; but I am not aware of any direct authority on the question, and it may admit of argument.

[5] In reason, not necessary. See, as illustrative, Crim. Law, I. § 1086, 1112; Crim. Proced. II. § 108, 274.

[6] Plainly not necessary.

[7] "To the great hindrance," &c. "in contempt," &c. unnecessary. Ante, § 48; Crim. Proced. I. § 647. The rest in these brackets is common. I am not aware of any authority or reason requiring it; though it would, at least in some circumstances, be a defence that the defendant did not desist but prosecuted the offender. Rex *v.* Stone, 4 Car. & P. 379. In a printed blank before me, drawn for use in Albany, New York, this clause is employed.

[8] 2 Chit. Crim. Law, 221. For a sim-

§ 126. **After Steps taken.** — When the compounding has occurred after steps have been taken in the prosecution of the principal offender, it is common for the indictment to set them out, while yet it is believed by the present writer not to be necessary. For example, —

That B, &c. of, &c. on, &c. at, &c. came before M, esquire, then and there being one of the justices of the peace in and for, &c. duly authorized and qualified to execute and perform the duties of that office, and act as hereinafter recited; and then and there upon his oath did charge, accuse, and complain against one A, &c. of, &c. for that, &c. [setting out the offence of A], *which said accusation was and is true;*[1] and thereupon the said M, *at the said time and place of the making of the said accusation and complaint,*[2] issued his warrant under his hand and seal, in due form of law, for the apprehension and taking of the said A to answer to and be examined and dealt with touching and concerning the felony aforesaid, so as aforesaid charged upon him the said A, as to law and justice might appertain. And afterwards, to wit, on, &c. at, &c. by virtue of the said warrant, and for the felony aforesaid, the said A was duly arrested and taken and carried before the said M, esquire, the justice aforesaid, and examined by him the said justice of and concerning the felony aforesaid, and the subject-matter of said complaint was examined into and heard by the said justice. Upon which said examination and hearing the said M, esquire, did on said last-mentioned day there make a certain warrant under his hand and seal, in due form of law, directed to the Keeper of the Commonwealth's jail in, &c. or his under-keeper or deputy, thereby commanding the said keeper or his deputy to receive into his custody the body of the said A, so charged with such felony as aforesaid, and him in custody safely to keep until he should be discharged by due course of law. And that the said B, well knowing the premises, but contriving and intending unlawfully and unjustly to pervert the due course of law in this behalf, and to cause and procure the said A, for the felony aforesaid, to escape with impunity, afterwards, to wit, on, &c. at, &c. unlawfully and for the sake of private gain did take upon himself to compound the said felony on behalf of the said A, and on said last-mentioned day there did exact, receive, and have of the said A the sum of, &c. for and as a reward for compounding the said felony, and for desisting from all further prosecution against the said A for the same; against the peace, &c.[3]

ilar form, see Archb. Crim. Pl. & Ev. 19th ed. 896.

[1] These italic words are not in the form from which I am copying, but there is so much room to doubt the adequacy of the indictment without them that I suggest their insertion. If A in this case was not guilty, perhaps it might still be an indictable interference with public justice to agree to desist from the prosecution, but — would it be a compounding?

[2] Not in the original.

[3] Davis Prec. 97. And see, of the like sort, 4 Went. Pl. 327. The pleader can abridge the verbosity of this form to suit his taste.

§ 127. **On Statute — (18 Eliz.).** — The foregoing forms are for the offence as at common law. They will serve equally as guides to the indictment on a statute.[1] On the old statute of 18 Eliz. c. 5,[2] the ordinary form was as follows: —

That [the defendant] B, &c. [being an evil-disposed person and not regarding the statute in such case made and provided, nor fearing the penalties therein contained[3]], heretofore, to wit,[4] on, &c. at, &c. by and upon color and pretence of a certain matter of offence then and there pretended to have been committed by one A against a certain penal law, that is to say, by and upon color and pretence that, &c. [setting out A's act in violation of the penal law], unlawfully, wilfully, and corruptly did compound and agree with the said A, who was surmised to have offended against the same statute in manner aforesaid, for the said pretended offence; and did then and there, to wit, on, &c. at, &c. aforesaid, without process, take of and from the said A a certain sum of money, to wit, the sum of, &c. and divers, to wit, three bank-notes of the bank of, &c. for the payment of, &c. of the value of, &c. as and by way of composition for the said pretended offence, and in order to prevent an action being brought against him the said A for and in respect of the same; without the order or consent of any or either of His Majesty's courts at Westminster, and without any lawful authority for so doing [to the great hindrance and obstruction of public justice, in contempt of our said Lord the King and his laws, to the evil and pernicious example of, &c.[5]]; against the form of the statute, &c. against the peace, &c.[6]

V. *Misprision.*[7]

§ 128. **As to accessorial, &c.** — A misprision is of the same nature with a compounding,[8] except that the guilt of the offender is less intense. Practically it is almost never prosecuted, and the books are barren of forms. There are two sorts of it; thus, —

§ 129. **Neglect to Disclose and Prosecute.** — Chitty's form is, rejecting palpable verbiage, —

[After setting out the principal offence, proceed]: and that B, &c. [the defendant],[9] well knowing the premises, and well knowing the name and

[1] Ante, § 31.
[2] Crim. Law, I. § 712.
[3] Not necessary. Ante, § 45, 46.
[4] Also unnecessary.
[5] Unnecessary. Ante, § 45, 48.
[6] Rex *v.* Gotley, Russ. & Ry. 84, note. For other forms on this and similar English statutes, see 2 Chit. Crim. Law, 223–232; 4 Went. Pl. 319–326; 6 Ib. 399; Reg. *v.* Best, 2 Moody, 124; Rex *v.* Crisp, 1 B. & Ald. 282.
[7] Crim. Law, I. § 716–722.
[8] Ante, § 123.
[9] I should prefer to add here an averment of time and place. See ante, § 106, 111, and the places there referred to.

person and usual place of resort of the said A, but devising and intending to obstruct and hinder the due course of justice and to cause the said A to escape unpunished for the said offence so by him committed, afterwards, to wit, on, &c. at, &c.[1] unlawfully, maliciously, wickedly, wilfully, and contemptuously did conceal, keep secret, and neglect to discover the said felony so as aforesaid committed by the said A, and the name, person, and usual place of resort of the said A did utterly refrain and forbear to disclose and make known; against the peace, &c.[2]

§ 130. **Neglect to prevent Felony.** — The only form for this branch of the offence before the compiler was drawn by an attorney-general of Massachusetts and never used. Omitting what the practitioner can readily supply, it is, —

That one A, &c. one B, &c. and one C, &c. on, &c. at, &c. wickedly, injuriously, and maliciously did conspire, combine, agree, intend, and determine, &c. [proceeding to state the offence proposed to be committed], and that D, &c. [the defendant] well knowing the premises, and also well knowing the names, persons, and usual places of abode and resort of the said A, B, and C, but devising and intending that they should carry into effect and commit the said intended felony without being prevented and brought to justice therefor, on, &c. at, &c. unlawfully, wickedly, wilfully, maliciously, and contemptuously did conceal, keep secret, and neglect to discover the felony so as aforesaid agreed, intended, and determined to be done and committed in manner aforesaid; and the names, persons, and usual places of resort of the said A, B, and C, did, during all the time aforesaid, utterly refrain and forbear to disclose and make known; against the peace, &c.[3]

[1] Better transpose this allegation of time to the earlier part of the sentence to read, "that afterward, on, &c. at, &c. B, &c. well knowing," &c. See ante, § 118, note.

[2] 2 Chit. Crim. Law, 232. And see 4 Chit. Crim. Law, 14.

[3] Davis Prec. 169.

CHAPTER IX.

INDICTMENTS AND COMPLAINTS ON PRIVATE STATUTES AND MUNICIPAL BY-LAWS.[1]

§ 131. **How Chapter divided.** — We shall consider the forms for, I. Private Statutes; II. Municipal By-laws.

I. *Private Statutes.*

§ 132. **Averring Statute.** — The indictment or complaint on a private statute differs from that on a public one only in requiring the statute to be set out therein. The form is not well settled by precedents; indeed, the present compiler, after considerable research, has been able to find in the books no precedent for it, except in civil causes. The following is suggested: —

That heretofore and before the transpiring of the facts hereinafter alleged, it was enacted by the Senate and House of Representatives of the United States of America [*or*, should the statute be a Massachusetts one, it was enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, pursuing the enacting style of the particular State], in manner and form following, that is to say, that, &c. [here copying simply so much of the statute as the indictment is to be founded upon, but substituting *should*[2] for "shall," &c.], and that afterward, &c. [proceeding now to draw the indictment in the same manner as on a general statute].[3]

[1] Stat. Crimes, § 394–408.

[2] The past tense seems to be appropriate and perhaps necessary; because, in some way, the statute must appear to have been in existence when the offence was committed and before the indictment was found. And see, as illustrative, Crim. Proced. I. § 1349. And see the form in the next note.

[3] Shorter forms for this averment are permitted by statutes in some of the States. Stat. Crimes, § 402; The State v. Heaton, 77 N. C. 505. To show the ancient method, I will here copy from Wentworth

II. *Municipal By-laws.*

§ 133. **Setting out By-law.** — If, by the practice of the particular State, the indictment or complaint must set out the by-law, the form in the last section will be suggestive, and the discussions in "Statutory Crimes" will show how the rest should be.[1]

§ 134. **Illustrative English Form — (Obstruction in Street).** — The following is on the Municipal Corporations Act of 5 & 6 Will. 4, c. 76, § 90, 91: —

That A, &c. on, &c. at, &c. [within the precincts of said borough[2]], did unlawfully suspend an article of dress, to wit, a shirt, over the causeway

the form of reciting a statute in a penal action of debt. The 4th section of 6 Anne, c. 16, after a preamble, proceeds: "From and after the determination of this present session of Parliament, all persons that shall act as brokers within the city of London and liberties thereof shall from time to time be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behavior as that court shall think fit and reasonable, and shall upon such their admission pay to the chamberlain of the said city for the time being, for the uses hereinafter mentioned, the sum of forty shillings, and shall also yearly pay to the said uses the sum of forty shillings, upon the nine and twentieth day of September in every year." Then the 5th section declares: "If any person or persons, from and after the determination of this present session of Parliament, shall take upon him to act as a broker, or employ any other under him to act as such, within the said city and liberties, not being admitted as aforesaid, every such person so offending shall forfeit and pay, to the use of the said mayor and commonalty and citizens of the said city, for every such offence, the sum of five and twenty pounds, to be recovered by action of debt, in the name of the chamberlain of the said city, in any of her Majesty's courts of record, in which no protection, essoin, or wager of law shall be allowed, or any more than one imparlance." And the following is the opening part of a count of a declaration on this statute for acting as broker in London, not being admitted by the court of the mayor and aldermen to act as such: —

"That whereas, in and by a certain act made in a Parliament of the Lady Anne, late Queen of Great Britain, holden at Westminster in the county of Middlesex, the twenty-third day of October in the sixth year of her reign, it was amongst other things enacted by the authority of the same Parliament, that from and after the termination of the then session of Parliament all persons that should act as brokers within the city of London and liberties thereof should from that time be admitted so to do by the court of the mayor and aldermen of the said city for the time being, under such restrictions and limitations for their good behavior as that court should think fit and reasonable; and it was further enacted by the said act, that, if any person or persons from and after the determination of the then present session of Parliament should take upon him to act as a broker, or employ any under him as such, within the said city and liberties, not being admitted as aforesaid, every such person so offending should forfeit and pay to the mayor and commonalty and citizens of the said city for every such offence the sum of twenty-five pounds, to be recovered by action of debt in the name of the chamberlain of the said city in any court of record (of the said lady the queen)." 7 Went. Pl. 241.

[1] Stat. Crimes, § 403–408.

[2] Not in the form quoted from, but I presume something like this is desirable or perhaps necessary.

of a certain street there called High Street, for the purpose of then and there drying the same, contrary to the by-law of and for the said borough in that behalf duly made at a meeting of the council of the said borough, held on, &c. and which said by-law was at the time of the commission of the said offence, and still is, in force for the said borough, and contrary to the form of the statute in such case made and provided.[1]

§ 135. **In General.** — The above form is sufficient only under statutes modifying the common-law rule. One defect at the common law would be, that it does not set out the by-law. Possibly it is otherwise insufficient at the common law; as, for example, it does not say "against the peace," &c., but it is not proposed to intimate an opinion on this question. The practitioner, to be safe, will carefully look into the statutes of his own State and the decisions of the courts thereon.

§ 136. **Other Forms.** — For other forms on municipal by-laws, the reader is referred to a subsequent section,[2] and to cases cited in the note.[3]

[1] Paley Convict. 4th ed. 522.

[2] Post, § 171.

[3] *Kansas.* — West *v.* Columbus, 20 Kan. 633.

Massachusetts. — Commonwealth *v.* Rice, 9 Met. 253; Commonwealth *v.* Dow, 10 Met. 382; Commonwealth *v.* Curtis, 9 Allen, 266.

Michigan. — Napman *v.* People, 19 Mich. 352.

Texas. — Ex parte Slaren, 3 Texas Ap. 662; Ex parte Boland, 11 Texas Ap. 159.

BOOK III.

THE SPECIFIC OFFENCES.

For ABDUCTION OF WOMEN, see SEDUCTION AND ABDUCTION.
ABETTORS, see ante, § 114–117, 119–121.

CHAPTER X.

ABORTION.[1]

§ 137. **Differences.** — Both under the statutes of our differing States, and under the common law as adjudged in the tribunals, there are differences in the elements which constitute this offence. The indictment must conform to the law prevailing in the place where it is to be tried. Still, —

§ 138. **Formula.** — The following formula, to be varied to conform to what the particular court in the particular State will hold the law to be, will serve for nearly every sort of indictment, whether for the substantive offence or for the attempt, at common law or under a statute: —

That one X [ante, § 79] being, on, &c. at, &c. [ante, § 80] a woman [2] pregnant [and quick [3]] with child, A, &c. [ante, § 74–77] did then and

[1] For the direct exposition, as to both law and procedure, see Stat. Crimes, § 740–762. Collateral, Crim. Law, I. § 328, 741, 769; II. § 691; Crim. Proced. I. § 1173. And compare with ASSAULT AND BATTERY — HOMICIDE.

[2] These words, "a woman," are here inserted out of respect to the usage in many of our States. I do not deem them necessary, even in an indictment on a statute containing them; the same reasons governing as in rape, wherein they are not required. Crim. Proced. II. § 952. And indictments for abortion without them have been sustained; nor is it the more common practice in England or in all of our States to insert them. Reg. *v.* Ashmall, 9 Car. & P. 236; Rex *v.* Scudder, 1 Moody, 216; Archb. Crim. Pl. & Ev. 19th ed. 771, 772; Reg. *v.* Hillman, Leigh & C. 343; Reg. *v.* Cramp, 5 Q. B. D. 307; Commonwealth *v.* Jackson, 15 Gray, 187; Commonwealth *v.* Snow, 116 Mass. 47; Commonwealth *v.* Boynton, 116 Mass. 343; Commonwealth *v.* Brown, 121 Mass. 69, 71; Commonwealth *v.* Drake, 124 Mass. 21; Commonwealth *v.* Blair, 126 Mass. 40; Commonwealth *v.* Adams, 127 Mass. 15; Hunt *v.* People, 3 Parker C. C. 569; Cobel *v.* People, 5 Parker C. C. 348; Mongeon *v.* People, 55 N. Y. 613; The State *v.* Vawter, 7 Blackf. 592.

[3] By some opinions necessary at the common law. Stat. Crimes, § 744, 745,

there unlawfully [if the indictment is on a statute, use, instead of "unlawfully," the statutory adverbs and other qualifying words, whatever they may be [1]] administer to her [*or* thrust, &c. or both; setting out, on the principle explained ante, § 18–21, all the acts of the defendant which, while not repugnant, are within any fair probability of being covered by the proofs [2]], with the intent thereby [3] to cause and procure the abortion and miscarriage of her the said X of the child wherewith she was so [quick and] pregnant [thus far, an indictable attempt is alleged. If it culminated in the accomplished abortion, proceed]: in consequence whereof, the life of the said child was then and there destroyed, and it was then and there prematurely born [adding, if the indictment is on a statute, any further words which may be necessary to bring it within the interpreted [4] statutory terms, such as] the same not being then and there necessary to preserve the life of the said X [*or*, not having been advised by any physician to be, &c.]; [5] against the peace, &c. [ante, § 65–69]. [6]

753; Mitchell *v.* Commonwealth, 78 Ky. 204; Commonwealth *v.* Parker, 9 Met. 263. By others, not necessary. Stat. Crimes, ut sup. and the cases there referred to. Generally unnecessary under statutes, but that will depend on the statutory terms. Stat. Crimes, § 746, 753, 754.

[1] "Feloniously." — Where the offence is felony, add, in most of the States, "feloniously," though the word is not in the statute. Ante, § 100, and the places there referred to.

[2] That method is permissible. See also Stat Crimes, § 759. And see, for a form, Commonwealth *v.* Brown, 14 Gray, 419.

[3] As to adding time and place here, see post, § 140, note.

[4] Ante, § 32, 33.

[5] Stat. Crimes, § 755.

[6] Our books often designate the mere attempt — like the administering of a drug or the employing of an instrument with the intent to procure a miscarriage — abortion. And there is between it and the substantive offence no distinction which will not be obvious. For further forms, see Stat. Crimes, § 752, 758 *a*; 3 Chit. Crim. Law, 797–801; Archb. Crim. Pl. & Ev. 19th ed. 771, 772; 6 Cox C. C. App. 99, 100; Rex *v.* Scudder, 1 Moody, 216, 3 Car. & P. 605; Anonymous, 3 Camp. 74; Reg. *v.* Ashmall, 9 Car. & P. 236; Reg. *v.* Hillman, Leigh & C. 343, 9 Cox C. C. 386; Reg. *v.* Isaacs, Leigh & C 220, 9 Cox C. C. 228; Reg. *v.* Cramp, 5 Q. B. D. 307, 14 Cox C. C. 401; Reg. *v.* Perry, 2 Cox C. C. 223; Reg. *v.* Hollis, 12 Cox C. C. 463, 6 Eng. Rep. 319; Reg. *v.* O'Callaghan, 14 Cox C. C. 499.

Colorado. — Dougherty *v.* People, 1 Col. Ter. 514.

Indiana. — Willey *v.* The State, 52 Ind. 246; The State *v.* Elder, 65 Ind. 282; The State *v.* Sherwood, 75 Ind. 15.

Iowa. — The State *v.* Hollenbeck, 36 Iowa, 112; The State *v.* Stewart, 52 Iowa, 284.

Kansas. — Madden *v.* The State, 1 Kan. 340, 347.

Kentucky. — Mitchell *v.* Commonwealth, 78 Ky. 204.

Maine. — The State *v.* Dyer, 59 Maine, 303.

Maryland. — Hays *v.* The State, 40 Md. 633.

Massachusetts. — Commonwealth *v.* Bangs, 9 Mass. 387; Commonwealth *v.* Parker, 9 Met. 263; Commonwealth *v.* Wood, 11 Gray, 85; Commonwealth *v.* Brown, 14 Gray, 419; Commonwealth *v.* Jackson, 15 Gray, 187; Commonwealth *v.* Sholes, 13 Allen, 554; Commonwealth *v.* Thompson, 108 Mass. 461; Commonwealth *v.* Snow, 116 Mass. 47; Commonwealth *v.* Boynton, 116 Mass. 343; Commonwealth *v.* Brown, 121 Mass. 69, 71; Commonwealth *v.* Drake, 124 Mass. 21; Commonwealth *v.* Blair, 126 Mass. 40; Commonwealth *v.* Adams, 127 Mass. 15; Commonwealth *v.* Wunsch, 129 Mass. 477.

Minnesota. — The State *v.* McIntyre, 19 Minn. 93; The State *v.* Owens, 22 Minn. 238.

Missouri. — The State *v.* Van Houten,

§ 139. **Form with the Common Surplusage — (Assault and Abortion — Administering with Intent).** — Rarely will the occasion arise to allege an assault as an element in this offence; because the woman commonly consents, and this takes from the wrongful act the legal quality of assault.[1] But there may be such a case.[2] And Chitty has for it the following form, drawn upon the common law. It exhibits the ordinary useless redundancies in the allegation: —

That A, &c. [being a wicked, malicious, and evil disposed person, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil [3]], on, &c. [with force and arms [4]], at, &c. aforesaid, in and upon one X, the wife of Y [in the peace of God and our said sovereign lord the king then and there being [5]], and also then and there being big and pregnant with child, did make a violent assault, and that he the said A then [and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms [6]], at, &c. aforesaid, knowingly, unlawfully, wilfully, wickedly, maliciously, and injuriously did give and administer [and cause and procure to be given and administered [7]] to the said X, so being big and pregnant with child as aforesaid, divers deadly, dangerous, unwholesome, and pernicious pills, herbs, drugs, potions, and mixtures,[8] with intent feloniously, wilfully, and of his the said A's malice aforethought, to kill and murder the said child, with which the said X was so then big and pregnant as aforesaid [by rea-

37 Misso. 357; The State *v.* Meek, 70 Misso. 355.

New Jersey. — The State *v.* Drake, 1 Vroom, 422; The State *v.* Gedicke, 14 Vroom, 86.

New York. — People *v.* Jackson, 3 Hill, N. Y. 92; Hunt *v.* People, 3 Parker C. C. 569; Cobel *v.* People, 5 Parker C. C. 348; Crichton *v.* People, 6 Parker C. C. 363, 1 Abb. Ap. 467; Mongeon *v.* People, 55 N. Y. 613.

Pennsylvania. — Mills *v.* Commonwealth, 1 Harris, Pa. 631.

Texas. — Watson *v.* The State, 9 Texas Ap. 237, 242.

[1] Crim. Law, I. § 260, 261; II. § 35, 36, 72 *b*; Stat. Crimes, § 495, 496, 744, 749.

[2] And see Stat. Crimes, § 744.

[3] Unnecessary. Ante, § 44, 46.

[4] Unnecessary. Ante, § 43.

[5] Unnecessary. Ante, § 47.

[6] "With force and arms" unnecessary. Ante, § 43. The rest of this matter in brackets is better omitted. Ante, § 81, 82; Crim. Proced. I. § 387–401.

[7] These words, though not legally harmful, can in no condition of the proofs do any practical good, and they better be omitted. Crim. Proced. I. § 332–334, 585, 586; II. § 224, 438. The statutory expression "cause *and* procure the miscarriage," &c. is different; and the indictment must contain both terms. Stat. Crimes, § 758.

[8] Davis says, in a note to one of his precedents: "It may be advisable in all cases, when the name of the medicine or drug is unknown, to allege in the indictment that it was a certain dangerous, &c. drug, potion, &c. 'the name of which is to the jurors aforesaid unknown.' But see 3 Chit. 797, note, where it is said the name of the poison is not material; cites 3 Camp. 75." Davis Prec. 35, note. I should certainly concur with Davis in this recommendation, and should name the drug when it is known. As to which see further Stat. Crimes, § 756, 757.

son and means whereof, not only the said child whereof she the said X was afterwards delivered, and which by the providence of God was born alive, became and was rendered weak, sick, diseased, and distempered in body, but also the said X, as well before as at the time of her said delivery, and for a long time, to wit, for the space of six months then next following, became and was rendered weak, sick, diseased, and distempered in body, and during all that time underwent and suffered great and excruciating pains, anguish, and torture, both of body and mind,[1] and other wrongs to the said X he the said A then and there unlawfully, wilfully, wickedly, maliciously, and injuriously did; to the grievous damage of the said X [2]], and against the peace of, &c.[3]

§ 140. **Administering with Intent, at Common Law.** — The following form, omitting allegations certainly needless, has been adjudged good at the common law, and especially against the objection that it should have charged "the intent to cause and procure the miscarriage and abortion of the child," instead of the pregnant mother: —

That A, &c. on, &c. at, &c. did wilfully, maliciously, unlawfully, and wickedly administer to and cause to be taken by one X, [single woman,[4]] she the said X being then and there big and pregnant [and quick [5]] with child, divers large quantities of deadly, dangerous, unwholesome, and pernicious pills, herbs, drugs, potions, teas, liquids, powders, and mixtures;[6] with intent thereby then and there [7] to cause and procure the miscarriage and abortion of the said X, and the premature birth and destruction of the said child, of which she was then and there, &c.; against the peace, &c.[8]

[1] Looking upon this indictment as at common law, the matter within these brackets thus far is, while not legally necessary, not altogether objectionable. See, for the explanation, Crim. Proced. II. § 63, 63 *a*; Crim. Law, II. § 42, 43.

[2] The rest of this matter in brackets is not only needless, but it plainly better be omitted. Ante, § 48; Crim. Proced. II. § 55, 57.

[3] 3 Chit. Crim. Law, 798. And see Commonwealth *v.* Snow, 116 Mass. 47.

[4] Unnecessary. Ante, § 78, 138, note.

[5] These words were not in the indictment which was sustained, but in some States they are necessary. Ante, § 138 and note.

[6] See ante, § 139 and note.

[7] It may be prudent to retain these words "then and there," but I do not deem them legally necessary; because, first, the earlier allegation of time and place may well be understood to qualify the whole sentence; and, secondly, if this were not so, still, in point of law, the intent need not be to have the miscarriage occur when and where the wrongful act was done. The offence would be equally perpetrated if the purpose were to have the miscarriage occur at any other time or place. And see ante, § 106, 109, 111, and notes, and the places there referred to. And see the form ante, § 139.

[8] Mills *v.* Commonwealth, 1 Harris, Pa. 631. Compare this case with People *v.* Lohman, 2 Barb. 216; Commonwealth *v.* Parker, 9 Met. 263; Mitchell *v.* Commonwealth, 78 Ky. 204; People *v.* Jackson, 3 Hill, N. Y. 92.

§ 141. *Particular Allegations on Statutes : —*

Administering Drug, &c. — The terms of these statutes differ, and the pleader will follow those of the one on which he is proceeding. Examples of the allegation are —

Did feloniously, wilfully, and unlawfully administer to one X, then and there being pregnant with a child, a large quantity of medicine, with intent thereby feloniously, &c. to procure the miscarriage of said X; the administering of said medicine to said X not then and there being necessary to preserve her life.[1]

Did advise and attempt to procure and did procure one X to take certain medicines, drugs, and substances; to wit, certain pills known as Dr. James Clark's Female Pills; which, &c., with the intent of procuring the miscarriage of her, the said X, she then and there being a pregnant woman.[2]

§ 142. **Operating with Instrument.** — The statutory terms as to this method of abortion differ, and the pleader will follow those on which he proceeds. Specimens of the allegation are —

Did unlawfully and wilfully employ and use in and upon the body and womb of one X, who was then and there a pregnant woman [as the said A well knew [3]], a certain instrument called a catheter,[4] with intent then and there and thereby to procure and produce the miscarriage of the said X; it not being then and there necessary to cause said miscarriage to preserve her life.[5]

Did unlawfully use a certain instrument, a more particular description

[1] The State *v.* Vawter, 7 Blackf. 592. It was deemed in this case not necessary to set out the name of the medicine or describe it as noxious. And see Shotwell *v.* The State, 37 Misso. 359; The State *v.* Van Houten, 37 Misso. 357. Further on this question see Stat. Crimes, § 756, 757; ante, § 139, note.

[2] Crichton *v.* People, 1 Abb. Ap. 467, 6 Parker C. C. 363. For other forms of the like sort with these two, see Rex *v.* Scudder, 1 Moody, 216, 3 Car. & P. 605; Anonymous, 3 Camp. 74; Watson *v.* The State, 9 Texas Ap. 237, 242; Reg. *v.* Hillman, Leigh & C. 343, 9 Cox C. C. 386; Reg. *v.* Isaacs, Leigh & C. 220, 9 Cox C. C. 228; Reg. *v.* Cramp, 5 Q. B. D. 307, 14 Cox C. C. 401; Reg. *v.* Perry, 2 Cox C. C. 223; Reg. *v.* Hollis, 12 Cox C. C. 463; Dougherty *v.* People, 1 Col. Ter. 514; Commonwealth *v.* Bangs, 9 Mass. 387; Hays *v.* The State, 40 Md. 633; The State *v.* Drake, 1 Vroom, 422; The State *v.* Van Houten, 37 Misso. 357; The State *v.* McIntyre, 19 Minn. 93; 3 Chit. Crim. Law, 797, 798.

[3] These words are plainly not necessary.

[4] Doubtless, if the instrument is known by name to the grand jury, they should say what it is; yet they should avoid needless description, embarrassing the proofs. The instrument need not be one expressly made for this work; thus, in People *v.* Jackson, 3 Hill, N. Y. 92, the allegation is, "certain instruments, to wit, one piece of wire, &c. with the intent," &c.

[5] The State *v.* Sherwood, 75 Ind. 15. The words of the statute in this case are, — "shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, anything whatever, or shall employ any means with intent thereby to procure the miscarriage of such

whereof is to the jurors unknown, by then and there forcing and thrusting it into the body and womb of one X, who was then and there pregnant with child, with the intent to procure her miscarriage thereof.[1]

Unlawfully and maliciously did thrust a certain instrument, the name of which is to the jurors aforesaid unknown, into the body and womb of one X, then and there being pregnant with child, with intent, &c. [as above].[2]

Did feloniously, unlawfully, and maliciously use a certain instrument, the name whereof is to the jurors unknown, by then and there forcing, thrusting, and inserting the same into the private parts of one X, with the intent thereby then and there[3] to procure her miscarriage.[4]

§ 143. **Causing Death.** — To cause the woman's death by an actual or attempted abortion is, at the common law, and under some of our statutes, a felonious homicide.[5] But there are, in some of our States, statutes under which this offence may or

woman, unless the same is necessary to preserve her life." The form might be —

Did wilfully employ in and about the person and womb of one X, supposing and believing her to be pregnant with child, an instrument called a catheter, with intent thereby to procure her miscarriage, the same not being a necessary means to preserve her life.

[1] Commonwealth *v.* Drake, 124 Mass. 21; Commonwealth *v.* Brown, 121 Mass. 69, 71; Commonwealth *v.* Boynton, 116 Mass. 343; The State *v.* Dyer, 59 Maine, 303; Commonwealth *v.* Wood, 11 Gray, 85; Commonwealth *v.* Sholes, 13 Allen, 554.

[2] Commonwealth *v.* Blair, 126 Mass. 40; Commonwealth *v.* Snow, 116 Mass. 47.

[3] As to this "then and there," see ante, § 140, note.

[4] Reg. *v.* Ashmall, 9 Car. & P. 236. **As to alleging Pregnancy.** — This indictment is for the attempt, and, the reader observes, it does not aver that the woman was pregnant. On principle, and, it is believed, on the authorities, such an allegation is necessary only when her pregnancy is an affirmative element in the offence. The statute is not given in the report of this case; but, from its date, it must have been 7 Will. 4 & 1 Vict. c 85, § 6, the words of which are "with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent." Under these words the woman's pregnancy, the offender believing it to exist, was held not to be necessary; hence this form of the indictment was good. Reg. *v.* Goodhall, 1 Den. C. C. 187; s. c. nom. Reg. *v.* Goodall, 2 Cox C. C. 41; s. c. nom. Reg. *v.* Goodchild, 2 Car. & K. 293. It was otherwise under 43 Geo. 3. c. 58, and 9 Geo. 4, c. 31, § 13, the terms of which are different. Rex *v.* Scudder, 1 Moody, 216, 3 Car. & P. 605; Crim. Law, I. § 741, note. And see Archb. Crim. Pl. & Ev. 19th ed. § 770, 771; Crim. Proced. II. § 86–92. As to the effect, in the law of attempt, of the non-existence of a supposed fact, both at the common law and under the statutes, see Crim. Law, I. 741–758. On an indictment in the following form, in substance nearly like that in the text, judgment was, in Commonwealth *v.* Wunsch, 129 Mass. 477, rendered against the defendant: —

Unlawfully did use a certain instrument, a particular description whereof is to the jurors unknown, by then and there forcing and thrusting it into the body and womb of X, with intent thereby then and there to cause and procure her miscarriage.

[5] Crim. Law, II. § 691; Stat. Crimes, § 742, 743. For the indictment in this aspect see the title HOMICIDE. For some forms see People *v.* Jackson, 3 Hill, N. Y. 92; Cobel *v.* People, 5 Parker C. C. 348; Hunt *v.* People, 3 Parker C. C. 569.

must be treated as an aggravated abortion.[1] The indictment may follow the appropriate one of the foregoing forms; simply adding the fact of the death in aggravation, in apt words, but not necessarily as in murder.[2] For example, it may be, —

That A, &c. [setting out his intent to procure an abortion, on whom, and his act toward it, or its accomplishment, with the statutory particulars and qualifications, as in the foregoing forms; then add] by reason and in consequence whereof the said X did afterward, on, &c. at, &c. die [*or*, in any other words to this effect, following the statutory expression]; against, &c.[3]

§ 144. *Practical Suggestions:* —

Witnesses. — Where the woman is alive, there is ordinarily this one competent witness[4] who, besides the defendant, knows personally the facts; and not often is there any other whose evidence is other than circumstantial. Therefore the prosecuting officer should, before he draws the indictment, take special pains to make himself sure of what this one direct witness will say. And to her testimony, on the other side, should the scrutiny of the counsel for the defence be specially directed. All the facts from other sources, which the court will permit to be laid before the jury, adapted to satisfy them of the degree of credit to be given this witness, should be, by the party they will benefit, produced. In rape there are special rules as to impeaching or confirming the like principal witness;[5] and, in reason, a similar, though perhaps not just the same, latitude would seem to be demanded in this offence. Still the cases thus far have not proceeded on this view, while yet it might well be urged to the judge on a doubtful question. Where the defendant is a professional abortionist, such as are found in our large cities, he is apt to be surrounded by persons on whose testimony very little reliance can be placed. To get at the true merits of these witnesses may well exhaust the fullest professional skill. Again, —

[1] Stat. Crimes, § 743, 759.

[2] Ib. § 759.

[3] In Commonwealth *v.* Jackson, 15 Gray, 187, this part of the indictment ran, that the said X, afterward, to wit, on, &c. at, &c. by means of the forcing and thrusting the instrument aforesaid by the said A as aforesaid in manner and form as aforesaid, then and there died; against, &c. For other forms, see Commonwealth *v.* Adams, 127 Mass. 15; Commonwealth *v.* Thompson, 108 Mass. 461; Mongeon *v.* People, 55 N. Y. 613. **Soliciting.** — In Reg. *v.* O'Callaghan, 14 Cox C. C. 499, is an indictment for soliciting to abortion, held to be defectively drawn. And see ante, § 141, the second form.

[4] Stat. Crimes, § 760.

[5] Crim. Proced. II. § 961–967.

§ 145. **Medical Jurisprudence.** — Not infrequently these are cases for consulting the books of medical jurisprudence, and medical and surgical experts; and sometimes for laying the testimony of the latter before the jury. No counsel, on either side, whatever his legal acquirements, can do justice to them, and no one should permit himself to enter upon them, except after full reading, conference with thoroughly competent experts, and profound reflection.

§ 146. **Examining Indictment.** — The counsel on both sides should examine the indictment as pointed out in earlier sections.[1]

[1] Ante, § 34–36.

For ABUSE, CARNAL, see post, § 903 et seq.
ACCESSORY, see ante, § 113–118.
ADMINISTERING POISON, see post, § 213, 533.
ADULTERATED FOOD, see NOXIOUS, &c.

CHAPTER XI.

ADULTERY, FORNICATION, BASTARDY, LIVING IN ADULTERY OR FORNICATION, OPEN AND NOTORIOUS LEWDNESS.[1]

§ 147. **Diversities.** — The statutes creating these offences are in differing terms, and to some extent the interpretations given by the courts to the same words differ in our States. The indictment is to be drawn on the interpreted[2] statute; hence the forms, in our respective States, are not quite uniform. Still, —

§ 148. **Formula for Indictment.** — The following formula, to be so varied with the differing interpreted terms of the statute as in each case to cover them, will ordinarily be adequate: —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], being then and there[3] the husband of one X [ante, § 79][4] [*or*, being then and there an unmarried man[5]], did commit adultery [*or* fornication] by then and there having carnal knowledge of the body of one Y,[6] a woman other than said X [*or*, did live in adultery[7] with one Y, a woman other than said X; *or*, did live in fornication, &c.; *or*, did openly, lewdly, lasciviously, and grossly cohabit in adultery and fornication with, &c.]; the said Y being then and there the wife of a man other than the said A,[8] to wit, of one Z; against the peace, &c. [ante, § 66].[9]

[1] See, for the direct discussions of these offences, Stat. Crimes, § 653–725. Collateral, Crim. Law, I. § 38, 39, 500, 501, 706, 767, 768, 795, 1121; II. § 184, 235, 708; Crim. Proced. I. § 419; II. § 241, 244, 956; Stat. Crimes, § 221, 643, 728. And consult INCEST — MARRIAGE OFFENCES — NUISANCE — POLYGAMY — SEDUCTION AND ABDUCTION.

[2] Ante, § 32, 33.

[3] As to this repetition of time and place, see Stat. Crimes, § 676.

[4] This allegation is required only when the defendant's marriage is an element in the offence. As to whether the name of the wife, and the time and place of the marriage, should be given, see Stat. Crimes, § 601–602 *a*, 673.

[5] Necessary only when the special terms of the statute make this an affirmative element in the offence. Stat. Crimes, § 693.

[6] As to this part of the form, see Stat. Crimes, § 674.

[7] Not adequate under all forms of the statute. Stat. Crimes, § 699–702, 706.

[8] To be inserted only when an element of the offence.

[9] For forms for these several offences in particular States, see —

Alabama. — Lawson *v.* The State, 20 Ala. 65; McNeil *v.* The State, 47 Ala.

§ 149. **Simple Adultery.** — The common forms of charging a single act of adultery are various. For example, —

That A, &c. on, &c. at, &c. did commit the crime of adultery with one X, who was then and there the lawful wife of Y, by then and there having carnal knowledge of the body of the said X; against, &c.[1]

Or, —

That A, &c. on, &c. at, &c. being then and there a married man and having a lawful wife alive, did commit adultery with a certain other woman whose name is to the jurors unknown; against, &c.[2]

498; Buchanan *v.* The State, 55 Ala. 154; Hoover *v.* The State, 59 Ala. 57, 58.

Arkansas. — The State *v.* Dunn, 26 Ark. 34.

Connecticut. — The State *v.* Bates, 10 Conn. 372.

Georgia. — Walker *v.* The State, 5 Ga. 491; Bighy *v.* The State, 44 Ga. 344; Hopper *v.* The State, 54 Ga. 389.

Indiana. — Robinson *v.* The State, 57 Ind. 113; The State *v.* Stephens, 63 Ind. 542; Williams *v.* The State, 64 Ind. 553; The State *v.* Johnson, 69 Ind. 85.

Iowa. — The State *v.* Fleak, 54 Iowa, 429.

Maine. — The State *v.* Hutchinson, 36 Maine, 261; The State *v.* Jackson, 39 Maine, 291; The State *v.* Weatherby, 43 Maine, 258.

Maryland. — Root *v.* The State, 10 Gill & J. 374; Norwood *v.* The State, 45 Md. 68.

Massachusetts. — Commonwealth *v.* Catlin, 1 Mass. 8; Commonwealth *v.* Calef, 10 Mass. 153; Moore *v.* Commonwealth, 6 Met. 243; Booth *v.* Commonwealth, 7 Met. 285; Commonwealth *v.* Tompson, 2 Cush. 551; Commonwealth *v.* Reardon, 6 Cush. 78; Commonwealth *v.* Parker, 4 Allen, 313; Commonwealth *v.* Squires, 97 Mass. 59.

Michigan. — Delany *v.* People, 10 Mich. 241.

Missouri. — The State *v.* Helm, 6 Misso. 263; The State *v.* Bess, 20 Misso. 419; The State *v.* Byron, 20 Misso. 210; The State *v.* Crowner, 56 Misso. 147; The State *v.* Osborne, 69 Misso. 143.

New Hampshire. — The State *v.* Clark, 54 N. H. 456; The State *v.* Parker, 57 N. H. 123.

North Carolina. — The State *v.* Aldridge, 3 Dev. 331; The State *v.* Jolly, 3 Dev. & Bat. 110; The State *v.* Fore, 1 Ire. 378; The State *v.* Cowell, 4 Ire. 231; The State *v.* Lyerly, 7 Jones, N. C. 158; The State *v.* Tally, 74 N. C. 322.

Pennsylvania. — Helfrich *v.* Commonwealth, 9 Casey, Pa. 68; Smith *v.* Commonwealth, 4 Smith, Pa. 209.

South Carolina. — The State *v.* Brunson, 2 Bailey, 149; The State *v.* Crawford, 10 Rich. 361, 363, 365.

Tennessee. — Grisham *v.* The State, 2 Yerg. 589; The State *v.* Cagle, 2 Humph. 414; Britain *v.* The State, 3 Humph. 203.

Texas. — Ashworth *v.* The State, 9 Texas, 490; Fox *v.* The State, 3 Texas Ap. 329, 332; Clay *v.* The State, 3 Texas Ap. 499; Parks *v.* The State, 4 Texas Ap. 134, 138; Swancoat *v.* The State, 4 Texas Ap. 105; McKnight *v.* The State, 6 Texas Ap. 158, 162; Edwards *v.* The State, 10 Texas Ap. 25.

Vermont. — The State *v.* Way, 6 Vt. 311; The State *v.* Bridgman, 49 Vt. 202.

Wisconsin. — Ketchingham *v.* The State, 6 Wis. 426; The State *v.* Fellows, 50 Wis. 65.

[1] Commonwealth *v.* Reardon, 6 Cush. 78. Similar is the form in The State *v.* Parker, 57 N. H. 123; The State *v.* Bridgman, 49 Vt. 202.

[2] Commonwealth *v.* Tompson, 2 Cush. 551. Two questions might be raised on this form; namely, whether the wife's name should not be given, and whether the words "by having carnal knowledge" should not be employed. As to which, see Stat. Crimes, § 673, 674. The form in Helfrich *v.* Commonwealth, 9 Casey, Pa. 68, 70, 74, adjudged to be good, is —

That A, &c. on, &c. at, &c. [and within the jurisdiction of this court, *unnecessary*, for

Or, —

That A, &c. [the woman], on, &c. at, &c. being then and there the lawful wife of X, feloniously[1] permitted another man, one Y, to have, and the said Y did then and there have, carnal knowledge of her body; against the peace, &c.[2]

§ 150. **Joint.** — Where, by the interpreted statute, the carnal act between a man who is either married or single and a woman who is the wife of another man is adultery in both, they may be jointly proceeded against, if so the prosecuting power chooses.[3] The following is an adequate form: —

That A, &c. and B, &c. on, &c. at, &c. not being then and there married to each other, but the said B then and there having a husband living other than the said A, to wit, one X, had carnal knowledge together, each of the body of the other, and thereby committed adultery; against the peace, &c.[4]

§ 151. **Fornication.** — Where the statute does not contain special terms[5] which the indictment is required to cover,[6] it is precisely the same for fornication as for adultery, omitting the allegation of a marriage of one of the parties to a third person; or, on an indictment for adultery, the conviction may be of fornication, if the proof of such marriage fails.[7] Yet, by some opinions, this proposition is subject to the further one, that, as carnal intercourse between husband and wife is lawful, a marriage between the parties must in some way be negatived in fornication. This is so held[8] under the terms of the Massachusetts statute,

the jurisdiction appears as of law], then and there being a married man and having a wife in full life, to wit, X, did commit adultery with a certain Y [then late of the same county, *unnecessary*. Ante, § 78, 79]; contrary, &c.

[1] "Feloniously" to be employed in States where adultery is felony. See ante, § 100, 106, 109.

[2] The State *v.* Bates, 10 Conn. 372. I have made this form a little more full than it is in the report, not saying that the expansion is necessary, but I deem it expedient.

[3] Stat. Crimes, § 670.

[4] Commonwealth *v.* Elwell, 2 Met. 190. And see Commonwealth *v.* Thompson, 99 Mass. 444.

[5] Stat. Crimes, § 692, 693.

[6] Crim. Proced. I. § 610–614, 618, 636.

[7] Stat. Crimes, § 690, 692, 693; The State *v.* Stephens, 63 Ind. 542; The State *v.* Jolly, 3 Dev. & Bat. 110.

[8] Commonwealth *v.* Murphy, 2 Allen, 163. Compare with Stat. Crimes, § 693. In Commonwealth *v.* Murphy, the learned judge denies the analogy, as to the point in contemplation, between fornication and rape. He says: "A different rule is applicable to the offence of rape, because a man may be principal in the second degree in the commission of that crime on his wife." To this view there are several answers, any one of which is conclusive. One is, that, though the law as to rape is so, it is equally true of any other sexual offence which a third person commits against a wife; if the husband participates in it, he

"if a man commits fornication with a single woman, each of them shall be punished."[1] The allegations may be, —

That A, &c. on, &c. at, &c. did commit fornication with one X, who was then and there a single and unmarried woman, by then and there having carnal knowledge of her person; against, &c.[2]

Or, —

That A, &c. and B, &c. on, &c. at, &c. being then and there single and unmarried persons,[3] did commit fornication together, by then and there having carnal knowledge each of the body of the other; against, &c.

§ 152. **Living in Adultery or Fornication.** — The indictment for these offences is the same as for the single act; except that it charges a living together by the parties, and permits the time to be laid with a *continuando* if the prosecuting power chooses.[4] It should pursue the statutory terms; which, as they differ in our respective States, should be before the pleader while drawing the indictment. For example, —

§ 153. **Indiana Provision.** — Under the words "every person who shall live in open and notorious adultery or fornication," the form may be, —

That A, &c. on, &c. [ante, § 80, *or* as at ante, § 83, 84], at, &c. did unlawfully live in open and notorious fornication [together[5]] with a woman

is punishable, however impossible its commission by him in person may be. But the reason for the sufficiency of the ordinary allegation in rape is not, for it cannot be, the one stated by the learned judge. Were there no other reason, such allegation could not be held to show *prima facie* guilt, as required by the rules of criminal pleading. It would make apparent a *possible*, not a *prima facie* guilt. Or, in the language of the learned judge, the effect of the allegation would be, that the defendant "*may be* a principal in the second degree." This is not enough. It never suffices to set out against a defendant matter from which it simply appears that he "may be" guilty; *prima facie* guilt must appear, nor will less ever suffice. Hence the true explanation is the one given at the place referred to in "Statutory Crimes."

[1] Mass. Pub. Stats. c. 207, § 8; Stat. Crimes, § 693.

[2] Compare with Train & H. Prec. 233, where the averments are more full. It cannot be necessary to deny that the man was married to a third person; because, though under another statute this would make his offence adultery, the exception, even should we regard it as one, is not in the statute whereon the indictment is drawn, and its negation does not constitute a part of the *prima facie* offence. Crim. Proced. I. § 632, 635, 636, 639. And, if we admit it to be necessary to allege that the parties were not married to each other, this appears in the averment that the woman was single and unmarried.

[3] As to alleging the one to be a man and the other a woman, see ante, § 138, note; Stat. Crimes, § 705.

[4] Stat. Crimes, § 699, 702, 703; Edwards *v.* The State, 10 Texas Ap. 25.

[5] The word "together" is in the form copied, and it would be necessary if it were in the statute. Stat. Crimes, § 699, 702, 706. I cannot see its propriety under a statute in the terms of this one.

named X[1] [*or* in open and notorious adultery with one X, to whom he was then and there not married, and who was then and there the wife of Y]; against, &c.[2]

§ 154. **North Carolina.** — Under a statute making it punishable "if any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed, and cohabit together," [*or*, "where they bed or cohabit together, they not being lawfully married,"][3] the form may be, —

That A, &c. and B, &c. on, &c. [as at ante, § 80, *or* § 83, 84, at the election of the pleader], at, &c. not being then and there lawfully married to each other, unlawfully did lewdly and lasciviously associate, bed, and cohabit together; against, &c.[4]

§ 155. **Another Provision** — in North Carolina creates a crime which it defines to be "a man taking a woman, or a woman a man, into his or her house, and having one or more children, without parting, or an entire separation." This is a clause of the statute last quoted; hence, or even if it did not stand in such a connection, a fair interpretation would require the words "not being married to each other" to be incorporated into it, and the

[1] The State *v.* Stephens, 63 Ind. 542. No averment that the woman was unmarried is necessary. Ante, § 151; Bicknell Crim. Pr. 446, 447; The State *v.* Gooch, 7 Blackf. 468. If the pleader should deem this question open to doubt, he could add, after X, "to whom he was then and there not married."

[2] See also The State *v.* Gartrell, 14 Ind. 280. See, for a form under the Alabama statute, Lawson *v.* The State, 20 Ala. 65.

[3] I think the expression has varied at different times, but the question is not material. The practitioner will follow the terms of what he finds to be the present statute.

[4] The State *v.* Jolly, 3 Dev. & Bat. 110; The State *v.* Lyerly, 7 Jones, N. C. 158; The State *v.* Tally, 74 N. C. 322. The form is here given in terms somewhat briefer than in any of the cited cases. Thus, in The State *v.* Jolly, after "cohabit together," it is added "as man and wife." I cannot see the necessity or even strict propriety of these words. In The State *v.* Lyerly, the allegations indicated by the statute are followed by the further one, that the defendants did then and there "commit fornication and adultery." There is nothing in the terms of the statute, or their interpreted meaning, which seems to require this. In The State *v.* Tally, where, as in the other cases, the indictment was held to be good, Settle, J. observed: "I believe it is a copy of an old and well-approved form, long in use by the solicitors of this State," p. 323. Yet it contains manifestly needless averments. It is, —

That A, &c. and B, &c. [being lewd and vicious persons. *Unnecessary.* Ante, § 46] and not united together in marriage, on, &c. [and on divers other days and times, both before and after that day. *Ill os a continuando*, and to be rejected as surplusage. Crim. Proced. I. § 388. There is a somewhat similar form which might pass. Ante, § 82], at, &c. did unlawfully and adulterously bed and cohabit together [and then and there did unlawfully commit fornication and adultery, in contempt of the holy rites of matrimony. *As to the former of these two clauses*, see above; *the latter is unnecessary.* Ante, § 48; Crim. Proced. I. § 647]; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

indictment to be framed as though it contained them.[1] In this view of the statute, the allegations may be, —

That A, &c. on, &c. at, &c. did take into his house one X, he and the said X not being then and there lawfully married to each other, and thence continually until, &c. did there cause her to remain in his said house without parting and without an entire separation; and on, &c. while she was remaining as aforesaid in his said house, he had there by her a child born; against, &c.[2]

§ 156. **Open Lewdness at Common Law.** — All lewdness, of a degree to be offensive or demoralizing, committed in a public place and in the presence of people there, is indictable at the common law as a public nuisance.[3] Of course, therefore, so is sexual commerce in public.[4] And so also it may be of an indecent living together by a man and woman not in matrimony, though the carnal acts are not before witnesses;[5] while yet the courts are perhaps not quite agreed as to where the line is here to be drawn between the indictable and unindictable. In Tennessee it is held sufficient at common law to allege, —

That A, &c. and B, &c. on, &c. at, &c. [being persons of evil disposition and designing to corrupt the morals of the people of the State[6]], unlawfully, openly, and publicly did live, dwell, and cohabit together in lewdness and adultery [in the county of Sevier[7]], they being unmarried to and with each other; against, &c.[8]

§ 157. **Under Statutes.** — The indictment for open lewdness under statutes will vary with the statutory expressions and their interpretations. Thus, —

[1] Ante, § 32, 33; Crim. Proced. I. § 623–629.

[2] The State *v.* Fore, 1 Ire. 378. The indictment in this case alleged that the defendant, Joel Fore, "did take into his house one Susan Chesnut, and they did then and there have one or more children, without parting or entire separation; they, the said Joel Fore and Susan Chesnut, never having been lawfully married." And it was held to be, though "very carelessly drawn, . . . sufficient."

[3] Crim. Law, I. § 500–502, 1125.

[4] Stat. Crimes, § 711; Reg. *v.* Elliot, Leigh & C. 103; Reg. *v.* Rowed, 3 Q. B. 180.

[5] Stat. Crimes, § 711 and the places there referred to.

[6] These words in brackets add nothing to the charge, and the former clause, if not all, is better omitted. Ante, § 45, 46; Crim. Proced. I. § 503.

[7] This repetition of the place is, of course, needless.

[8] The State *v.* Cagle, 2 Humph. 414. In Grisham *v.* The State, 2 Yerg. 589, the indictment was like this, but more voluminous. It was held sufficient. In the South Carolina case of The State *v.* Brunson, 2 Bailey, 149, the allegations were held not to set out a common-law crime. And compare with Reg. *v.* Rowed, supra; Rex *v.* Montague, Trem. P. C. 209; Rex *v.* Aleway, Trem. P. C. 214.

Lewd, &c., Person. — Under the words "lewd, wanton, and lascivious persons in speech or behavior,"[1] the allegation may be, —

That A, &c. on, &c. [with the *continuando* as at ante, § 83, 84, though probably this is not necessary], at, &c. was and still is a lewd, wanton, and lascivious person in speech and behavior; against, &c.[2]

§ 158. **Lewdly, &c., Cohabiting.** — Under a statute making punishable "every man and woman, one or both of whom are married and not to each other, who shall lewdly and lasciviously abide and cohabit with each other," the allegation may be, —

That A, &c. and B, &c. on, &c. at, &c. not being then and there married to each other, did lewdly and lasciviously abide and cohabit with each other, the said A being then and there a married man [the husband of one X, a woman other than said A[3]]; against, &c.[4]

Or, should the statutory words be simply, "if any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together,"[5] the form may be, —

That A, &c. and B, &c. on, &c. at, &c. not being then and there married to each other, did lewdly and lasciviously associate and cohabit together; against, &c.[6]

§ 159. **Bastardy.** — Where this offence[7] is the begetting of a bastard child, the indictment will follow the analogies in adultery and fornication. But where it consists of a refusal or neglect to give bonds, or obey a judicial order, for the support of such child, the form of allegation will be different. The special statutory words must be pursued, with due particularization of the individual instance. Something like the following appears to have been deemed adequate in South Carolina: —

That X, &c. a single woman, was, on, &c. at, &c. in the district of, &c. delivered of a female child, which by the laws of this State is a bastard,

[1] Mass. Gen. Stats. c. 165, § 28.

[2] Commonwealth *v.* Parker, 4 Allen, 313. For the principle which renders unnecessary the specification of particular acts of lewdness, see Crim. Proced. I. § 493–498.

[3] This matter in brackets is not in the form given in the case to which I am referring, and probably it is not necessary. But some courts might require it. Stat. Crimes, § 673.

[4] The State *v.* Byron, 20 Misso. 210. And see The State *v.* Crowner, 56 Misso. 147; The State *v.* Osborne, 69 Misso. 143; The State *v.* Bess, 20 Misso. 419; Delany *v.* People, 10 Mich. 241.

[5] Mass. Gen. Stats. c. 165, § 6; R. S. c. 130, § 4.

[6] Compare with forms in Train & Heard Prec. 352, as to which, query. And see Commonwealth *v.* Calef, 10 Mass. 153; The State *v.* Clark, 54 N. H. 456.

[7] Stat. Crimes, § 691 et seq.

that the said child is likely to become a burden to the district aforesaid; that A, &c. [the defendant] is the father of the said child; and that, on, &c. and thence continually to the day of the finding of this indictment, at, &c. the said A did and still does, being thereto duly and lawfully required, refuse and neglect to enter into a cognizance, with two good and sufficient sureties, according to law, for and toward the maintenance of the said child; against the peace, &c.[1]

§ 160. *Practical Suggestions:* —

Name of Particeps Criminis doubtful — (Duplicity). — Where, in single adultery or fornication, there is doubt how the proofs of the name of the *particips criminis* may be, and it seems not safe to trust alone to the allegation that it is unknown, the best practical course is to add a second count or more. The method of bringing all into a single count, and still avoiding duplicity, stated in a previous chapter,[2] is not applicable here; because, if one commits adultery or fornication with two persons, in however close succession, there are evidently two offences, and to charge both in one count would render it double. It is otherwise with such an offence as assault and battery; for one blow may take effect on two persons.[3] But there cannot be one carnal penetration of two women. Where the wrong is the continuing one of living in adultery or fornication, or of open lewdness, the case in reason is different. A man may live in adultery, or commit open lewdness, with any number of women at once; thereby, probably, subjecting himself to but one punishment. Still this question has not been judicially passed upon, and a careful practitioner is cautious in treading on ground not hardened into a highway by adjudication.

Joining Offences. — In this class of crime it is oftener desirable than in some others to proceed for two or more criminal acts in one indictment. Then there must be not less than one count for each separate transaction. Still, —

§ 161. **Caution as to Evidence.** — Whether there are several counts or but a single one, the prosecuting officer should be on his guard not to be defeated in his efforts to lay before the jury

[1] The State *v.* Crawford, 10 Rich. 361, 363, 365. I have made some slight departure from the words in the report, and I should advise following this form only on a careful comparison of it with the existing statute. For a fuller form, with the statute on which it is drawn, see Walker *v.* The State, 5 Ga. 491. And see Root *v.* The State, 10 Gill & J. 374; Norwood *v.* The State, 45 Md. 68. For an English form for disobeying an order of maintenance, see Matt. Crim. Law, 429.

[2] Ante, § 18–21.

[3] Crim. Proced. I. § 437; II. § 60.

all the relevant testimony. Perhaps he will be required to elect, at an early stage of the hearing, on what particular transaction or count or counts he will ask for a verdict. This question being within the judicial discretion of the presiding judge, he can commonly do no otherwise than submit to whatever order is made.[1] But the admissibility of evidence is of law, not of discretion. And, to establish in this offence a particular act, it is competent to show, within recognized limits, what the defendant did both before and after, — a doctrine[2] which the prosecuting officer should familiarize himself with, and become able to explain and enforce to the court, before entering upon the trial.

§ 162. **Defence.** — Where, as in the majority of these cases, the evidence is circumstantial, the most available method for the defendant's counsel will ordinarily be to point out the absence of some needful link, or to break by counter testimony some such link, in the chain of the adduced circumstances. He should not suffer the jury to overlook the fact, or be allured from it by any artifice, that even an insufficient strength, creating reasonable doubt, at any one place in the chain,[3] is equivalent to the same thing in the whole.

[1] Crim. Proced. I. § 454 et seq.
[2] Stat. Crimes, § 677–685, 709.
[3] Crim. Proced. I. § 1076–1079.

For AFFRAY, see RIOT, &c.
AIDING AND ABETTING, ante, § 114–117, 119–121.
ALEHOUSE, see LIQUOR SELLING — NUISANCE.
ALLURING TO CRIME, see ante, § 105–107.

CHAPTER XII.

ANIMALS, OFFENCES RELATING TO.

§ 163. **Here — Elsewhere — How Chapter divided.** — We shall in this chapter consider, I. Illegal Marking and Altering of Marks; II. The Unlawful Driving of Cattle; III. Unlawful Herding; IV. Offences connected with Purchasing and Slaughtering; V. Neglect to restrain, Estrays, Impounding, and Offences relating thereto; VI. The Unlicensed Keeping of Dogs. The subject of Cruelty to Animals will constitute a chapter by itself. And larcenies of and malicious mischief to them, and cheats and nuisances effected by their means, will be placed under the several titles of Larceny, Malicious Mischief, Cheats and False Pretences, and Nuisances. Under some of the other titles something also of animals will appear.

I. *Illegal Marking and Altering of Marks.*[1]

§ 164. **Formula for Indictment.** — The terms of the statutes differ, and the pleader should duly cover the particular ones on which he is proceeding. His allegations, if they fulfil this rule, may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did, to defraud one X, put upon a certain heifer of the cattle[2] of the said X, the mark of him the said A,[3] without the consent of the said X [*or*, did, &c. alter the

[1] For discussions of these offences, with the pleading, practice, and evidence, see Stat. Crimes, § 454–461.

[2] Crim. Proced. I. § 568–570, 619.

[3] Stat. Crimes, § 459; The State *v.* Davis, 2 Ire. 153.

mark[1] upon a certain heifer of the cattle of the said X, by substituting therefor the mark of the said A, without the consent, &c.]; against, &c. [ante, § 66].[2]

§ 165. **Branding.** — Under the Texas statute it is good to say, following its terms, —

That A, &c. on, &c. at, &c. did unlawfully brand a certain colt [to wit, a sorrel mare colt[3]], said colt being then and there not his own, and being then and there the property of[4] some person whose name is to the jurors unknown, without the consent of the owner, and with the intent to defraud the owner thereof; against, &c.[5]

§ 166. **Altering.** — Under a provision making punishable one who "shall fraudulently alter or change the mark or brand of any animal, or shall fraudulently mark or brand any unmarked animal, with intent to claim the same, or prevent identification by the true owner thereof," the charge for altering may be, —

That A, &c. on, &c. at, &c. did fraudulently alter the brand of an animal to wit, a cow, of one X [of the value of five dollars[6]], by putting the

[1] And see The State *v.* Davis, supra.

[2] For forms practically in use, see Bicknell Ind. Crim. Pr. 482; Bassett Ill. Crim. Pl. 85. A form in Bicknell is on a statute which provides that "every person who shall alter the mark or brands on the horse, mare, gelding, ass, mule, sheep, goat, neat cattle, or hog of another, or mark or brand any such animal, with intent to steal the same, if the value of the animal so marked be five dollars or upward, shall be subject to the punishment inflicted on those guilty of grand larceny; and, if the value of such animal be less than five dollars, such person shall be subject to the punishment inflicted on those guilty of petit larceny." It is, —

That A, &c. on, &c. at, &c. unlawfully and feloniously altered the mark of a certain hog, of the goods and chattels of X, of the value of fifteen dollars [with the intent to steal the same], by then and there unlawfully and feloniously cutting out a crop on the right ear of said hog, and changing said mark into a swallow fork, said crop on the right ear being then and there the lawful and duly recorded mark for the hogs of the said X; against, &c.

The matter here inserted in brackets is not in the original, but it is clearly essential. The allegation of value, not generally required, is necessary on this form of the statute. Stat. Crimes, § 427, 444, 445, 464, 945. For other forms see —

Florida. — Atzroth *v.* The State, 10 Fla. 207; Morgan *v.* The State, 13 Fla. 671; Curry *v.* The State, 17 Fla. 683.

North Carolina. — The State *v.* Davis, 2 Ire. 153.

Texas. — The State *v.* Hall, 27 Texas, 333; The State *v.* Haws, 41 Texas, 161; Senterfit *v.* The State, 41 Texas, 186; Fossett *v.* The State, 11 Texas Ap. 40; Davis *v.* The State, 13 Texas Ap. 215.

[3] Unnecessary, and better omitted. Stat. Crimes, § 440, 443; Crim. Proced. I. § 486.

[4] It would be neater to say more briefly, a certain colt not then and there his own, but the property of, &c.

[5] The State *v.* Haws, 41 Texas, 161; Fossett *v.* The State, 11 Texas Ap. 40. "Without the consent," and "with intent to defraud," &c. are essential. The State *v.* Hall, 27 Texas, 333.

[6] As the value appears under this statute not to be an element of the offence, — that is, essential to the punishment, — it need not be alleged in the indictment. See the places cited ante, § 164, note.

same into his the said A's own proper brand [to wit, the letter A[1]], with intent to claim the said animal as his own; against, &c.[2]

II. *The Unlawful Driving of Cattle.*[3]

§ 167. **From Accustomed Range.** — Under the Texas statute, making punishable one who shall "wilfully take into possession and drive, use, or remove from its accustomed range, any live-stock not his own, without the consent of the owner, and with intent to defraud the owner thereof," the allegations may be, —

That A, &c. on, &c. at, &c. did wilfully take into his possession, and drive and remove from their accustomed range, one cow and one heifer,[4] not his own, being then and there the live-stock of one X, without the consent[5] of the said X, and with the intent to defraud him thereof; against, &c.[6]

§ 168. **Not having been Inspected.** — Under another Texas statute it would seem to be sufficient to say, —

That A, &c. on, &c. at, &c. did unlawfully drive out of said county of, &c. one hundred and fifty head of cattle the property of X, and not of said A, without the written consent of the said X, and without first having them duly inspected as the law requires; against, &c.[7]

III. *Unlawful Herding.*

§ 169. **Statute and Indictment.** — A Texas statute makes it unlawful for one "to herd any drove of horses or cattle, numbering more than twenty-five head," upon any land not his own within one half mile of any residence, without the consent of the owner of the land. And "whenever any person so unlawfully herding horses or cattle shall be requested by any resident of this State, residing within one-half mile of the place where such stock are

[1] Probably not necessary. See the places referred to ante, § 164.

[2] Atzroth *v.* The State, 10 Fla. 207; Morgan *v.* The State, 13 Fla. 671.

[3] Stat. Crimes, § 452, 453.

[4] A further description of the animals is unnecessary and injudicious. Ante, § 165 and places there referred to.

[5] Where the statute requires the consent to be in writing, say "written consent."

[6] Darnell *v.* The State, 43 Texas, 147; The State *v.* Thompson, 40 Texas, 515; Long *v.* The State, 43 Texas, 467. For a form on a somewhat analogous English statute, see Reg. *v.* Fitzsimons, 4 Cox C. C. 246.

[7] Covington *v.* The State, 6 Texas Ap. 512. **Not having Marks recorded.** — For the driving of cattle without having their marks on record, see Senterfit *v.* The State, 41 Texas, 186.

being so unlawfully herded, to remove the same from such land, and shall fail, refuse, or neglect to remove such stock at once, he shall be deemed guilty of a misdemeanor; and, upon conviction, &c. shall be fined in any sum not exceeding one hundred dollars for each hour of delay after notice given." The indictment may allege, —

That A, &c. on, &c. at, &c. did unlawfully herd, upon land not his own, within less than one-half mile of the residence of X, then residing in said county, and without the consent of the owner of the land, a drove of fifty horses; and, upon being then and there requested by the said X to remove the same from said land, did then and there neglect and refuse so to remove them for the space of one hundred several and consecutive hours from and after the making of the said request and notice; to wit, from and after three of the clock in the afternoon of said day to the end of the —— day of, &c.; against, &c.[1]

IV. *Offences connected with Purchasing and Slaughtering.*

§ 170. **The Indictment** — for these offences presents no practical difficulties, and it will be sufficient to refer to cases containing forms.[2]

V. *Neglect to restrain,*[3] *Estrays,*[4] *Impounding, and Offences relating thereto.*

§ 171. **Swine on Sidewalk — (Against City Ordinance).** — Under a city by-law making one punishable who shall "permit any horse, cattle, swine, or sheep under his care to go upon any sidewalk in the city, or otherwise occupy, obstruct, injure, or incumber any such sidewalk, so as to interfere with the convenient use of the same by all passengers," it is sufficient, where not necessary to set out the by-law,[5] to say in allegation, —

That A, &c. on, &c. at, &c. did unlawfully permit thirty swine then and there under his care to go upon and injure the sidewalks on certain public

[1] Caldwell *v.* The State, 2 Texas Ap. 53; Linney *v.* The State, 5 Texas Ap. 344.

[2] Against butcher for failing to return list of brands of cattle slaughtered. Schutze *v.* The State, 30 Texas, 508. For buying hide taken from a dead animal without owner's consent. The State *v.* Garcia, 38 Texas, 543. Purchasing without bill of sale, with expositions of the statute. Lastro *v.* The State, 3 Texas Ap. 363; Houston *v.* The State, 13 Texas Ap. 595.

[3] Stat. Crimes, § 223, 1136–1139.

[4] Ib. § 462–464.

[5] Ante, § 133–135; Stat. Crimes, § 406.

streets in the city of Cambridge, to wit, the sidewalks in Harvard Square and North Avenue, by rooting and destroying the same, so as to interfere with the convenient use of the same by all passengers;[1] against the peace of the Commonwealth and of the said city of Cambridge, and contrary to the form of the statute and of the by-law of said city in such case made and provided.[2]

§ 172. **Distraining and Impounding.** — At the common law, one finding cattle on his land doing damage may distrain and impound them.[3] This right and the general subject of impounding cattle have been much legislated upon in our States; and, in some of them, not in all,[4] but perhaps generally, the statutes have superseded the common law.[5] Hence, —

§ 173. **Pound Breach and Rescuing Cattle.** — Within principles explained in another connection,[6] the rescue, by breaking the pound or otherwise, of cattle lawfully distrained under either common-law or statutory authority, is indictable at the common law. So, at least on the better reason, the doctrine appears pretty plainly to be; though, as to cases in which there has been no assault or other breach of the peace, the authorities to it are a little contradictory and confused.[7] In the words of Chitty, "pound breach is an injury and insult to public justice, and as such seems to be indictable at common law."[8] If

[1] Commonwealth *v.* Curtis, 9 Allen, 266.

[2] Ante, § 135; Stat. Crimes, § 406, 407.

[3] 1 Chit. Gen. Pract. 656–659; Co. Lit. 96 *a*, 161 *a*; 3 Bl. Com. 6; Vaspor *v.* Edwards, 12 Mod. 658; Storey *v.* Robinson, 6 T. R. 138; Gimbart *v.* Pelah, 2 Stra. 1272; Anscomb *v.* Shore, 1 Camp. 285; Tyrringham's Case, 4 Co. 36 *a*, 38 *b*; Anonymous, 3 Wils. 126; Dovaston *v.* Payne, 2 H. Bl. 527; Hawkins *v.* Eckles, 2 B. & P. 359; Clement *v.* Milner, 3 Esp. 95; Whiteman *v.* King, 2 H. Bl. 4; Sheriff *v.* James, 1 Bing. 341; Gulliver *v.* Cozens, 1 C. B. 788; Cape *v.* Scott, Law Rep. 9 Q. B. 269.

[4] Hamlin *v.* Mack, 33 Mich. 103. And see Oil *v.* Rowley, 69 Ill. 469.

[5] Eastman *v.* Rice, 14 Maine, 419; Morse *v.* Reed, 28 Maine, 481; Sloan *v.* Hubbard, 34 Ohio State, 583; Dent *v.* Ross, 52 Missis. 188; Mooney *v.* Maynard, 1 Vt. 470; The State *v.* Young, 18 N. H. 543; Crocker *v.* Mann, 3 Misso. 472. See Colden *v.* Eldred, 15 Johns. 220; Rockwell *v.* Nearing, 35 N. Y. 302; Fitzwater *v.* Stout, 4 Harris, Pa. 22; Collins *v.* Larkin, 1 R. I. 219.

[6] Crim. Law, I. § 465–468. See II. § 1013; Reg. *v.* Williams, 1 Den. C. C. 529, 4 Cox C. C. 87, 2 Car. & K. 1001; Reg. *v.* Brenan, 6 Cox C. C. 381; Reg. *v.* Boyle, 7 Cox C. C. 428.

[7] 1 Russ. Crimes, 5th Eng. ed. 560; 2 Hawk. P. C. c. 10, § 56; The State *v.* Young, 18 N. H. 543; Rex *v.* Bradshaw, 7 Car. & P. 233. According to the latter case, and in reason, the rescue is indictable from the time when the cattle are "in the custody of the law." In The State *v.* Barrett, 42 N. H. 466, the court observed: "At common law, a rescue [not speaking of the rescue of a person arrested or imprisoned] is defined as the taking and setting at liberty, against law, a distress taken for rent, or services, or damage feasant." p. 469. And see The State *v.* Young, 18 N. H. 543.

[8] 2 Chit. Crim. Law, 204, note.

this were not so, still we have statutes making it indictable.[1] Now, —

§ 174. **Common-law Indictment.** — The indictment at the common law sets out the impounding, and then the rescue, or the breach of the pound, according to the facts. One of Chitty's forms for pound-breach and rescue, some parts whereof are needlessly plethoric, is, —

That on, &c. at, &c. [ante, § 80], one X, &c. [ante, § 79] took and distrained one mare and two colts of the cattle of A, &c. [the defendant, ante, § 74–77], [of the price of, &c.; in other forms in Chitty the words are, of the *value*, &c.[2]], in and upon a certain parcel of land of the said X there situate being found then wrongfully feeding, depasturing, destroying the growing grass, and doing damage to the said X,[3] as a distress for the damage then and there done and doing by the said animals; and did thereupon then and there impound and keep the same in the common pound of, &c. and detain them in said common pound there as a distress for the cause and damage aforesaid.[4] And [the jurors, &c. do further present[5]], that, while the said mare and colt were so impounded and remaining in the said common pound there as a distress for the cause aforesaid, the said A, on, &c. [with force and arms[6]], at, &c. aforesaid, broke and entered the said common pound, and, without the license and against the will of the said X, and without any satisfaction having been made to him for the said damage, did then and there unlawfully rescue, take, lead, and drive away the said mare and colt from and out of the said common pound; [in contempt, &c. to the evil example, &c. and[7]] against the peace, &c.[8]

§ 175. **Indictment on Statute.** — Under a statute to punish "any one who shall make any pound breach, or in any way, directly or indirectly, convey or deliver any creature out of any pound without lawful authority," the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully break and set open a good, lawful, and sufficient pound, erected and maintained by said town of, &c. for restraining and impounding all creatures therein liable to be impounded;

[1] Commonwealth *v.* Beale, 5 Pick. 514.

[2] I am not aware of any reason requiring the price or value to be alleged, and I do not believe it to be necessary. It is not in the form in Rex *v.* Bradshaw, 7 Car. & P. 233. See, for the rule, Crim. Proced. I. § 540, 541, 567; Stat. Crimes, § 427, 444, 445, 464, 945.

[3] I have slightly abridged this allegation.

[4] I am still abridging the form a little.

[5] Unnecessary. Ante, § 115, note.

[6] Unnecessary. Ante, § 43.

[7] Unnecessary. Ante, § 48; Crim. Proced. I. § 647.

[8] 2 Chit. Crim. Law, 204. For other forms, see Ib. 405, 406; The State *v.* Young, 18 N. H. 543. For rescue only, before impounding, see 2 Chit. Crim. Law, 203; Rex *v.* Bradshaw, 7 Car. & P. 233; The State *v.* Barrett, 42 N. H. 466; Commonwealth *v.* Hubbard, 24 Pick. 98.

and did then and there without lawful authority deliver and convey out of said pound one cow and one heifer,[1] then being in said pound lawfully impounded; against, &c.[2]

§ 176. **Estrays — (Taking up and using).** — One of the principal offences under our estray laws[3] is the taking up and using of an estray without complying with the statutory directions. A good indictment for it, upon the Texas statute, is the following: —

That A, &c. on, &c. at, &c. did unlawfully, without complying with the laws regulating estrays,[4] take up and use [a certain estray animal, to wit,[5]] a certain estray mare,[6] of the value of fifty dollars,[7] the property of[8] some person to the jurors unknown; against, &c.[9]

VI. *The Unlicensed Keeping of Dogs.*

§ 177. **Offence — Indictment or Complaint.** — There are, in some of our States, statutes requiring the keepers of dogs to procure licenses therefor, and making a non-compliance with their provisions criminal. But they are not so general as to render a discussion of them, and a presentation of the forms of procedure, a judicious use of our space. It will suffice to cite some cases wherein also are forms.[10]

[1] A particular description of the animals, such as their color, marks, and the like, need not be given. Ante, § 165 and note; Stat. Crimes, § 464.

[2] The State *v.* Young, 18 N. H. 543.

[3] Stat. Crimes, § 462–464.

[4] The State *v.* Hutchinson, 26 Texas, 111; The State *v.* Moreland, 27 Texas, 726.

[5] Not necessary. The State *v.* Carabin, 33 Texas, 697.

[6] That this description of the animal is sufficient, see ante, § 165, 175; Stat. Crimes, § 464.

[7] The value is important in Texas, as explained in Stat. Crimes, § 464. See ante, § 174 and note.

[8] The State *v.* Apel, 14 Texas, 428.

[9] Davis *v.* The State, 2 Texas Ap. 162. For another form, see The State *v.* Carabin, supra. For a form for **Taking up and Converting to own Use**, see Greene *v.* The State, 79 Ind. 537. See Dixon *v.* The State, 4 Blackf. 312.

[10] Blair *v.* Forehand, 100 Mass. 136, 137, note; Commonwealth *v.* Dow, 10 Met. 382; Jones *v.* Commonwealth, 15 Gray, 193; Commonwealth *v.* Gorman, 16 Gray, 601; Commonwealth *v.* Thompson, 2 Allen, 507; Commonwealth *v.* Brahany, 123 Mass. 245; Commonwealth *v.* Washburn, 128 Mass. 421.

CHAPTER XIII.

ARSON AND OTHER BURNINGS.[1]

§ 178. **How Chapter divided.** — We shall consider the indictment as to, I. The Substantive Offence; II. Attempts. To which will be added, III. Practical Suggestions.

I. *The Substantive Offence.*

§ 179. **Common-law Indictment.** — The ordinary indictment for common-law arson is, to copy Chitty's form, which is needlessly plethoric, —

That A, &c. [not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil [2]], on, &c. [with force and arms [3]], at, &c. a certain house [4] of one X [ante, § 79] there situate,[5] feloniously, wilfully, and maliciously [6] did set fire to and [the same house

[1] For direct expositions of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 8–21; Crim. Proced. II. § 31–53. Incidental, Crim. Law, I. § 224. 318, 329, 334, 514, 559, 577, 686, 765, 781; Crim. Proced. I. § 540, 573, 613; Stat. Crimes, § 207, 213, 277, 289, 291, 310, 311.

[2] Unnecessary. Ante, § 44.

[3] Unnecessary. Ante, § 43.

[4] Not "dwelling-house," as in burglary, but "house." Crim. Proced. II. § 34.

[5] The words "there situate" are common; but they are believed not to be necessary, though this is not in all the States clear beyond argument. Where they are certainly not necessary, the better practice is to omit them. Crim. Proced. II. § 41, 135.

[6] "Feloniously" is, of course, necessary, the offence being felony. "Voluntarily" may be substituted for "wilfully" if the pleader chooses. "Maliciously" is probably indispensable; but it is not clear that either "voluntarily" or "wilfully" must be connected with it, for in meaning it seems to include them. Perhaps not all these distinctions are firmly established. And the rules may be different under statutes, for then the statutory words should be followed. Consult Crim. Proced. I. § 613; II. § 42–44; 3 Chit. Crim. Law, 1122; 1 Hale P. C. 567, 569; 3 Inst. 67.

then and there, by such firing as aforesaid, feloniously, wilfully, and maliciously did [1]] burn [and consume [2]]; against the peace, &c.[3]

§ 180. **General Formula.** — Most of the indictments are drawn on statutes, some of which have enlarged the bounds of this felony, and others created misdemeanors analogous to it. They follow the common-law form, except that they substitute for the common-law terms such statutory ones as differ from them, and add any ingredients which the statutes have introduced into the offence.[4] The outline, to be filled up and varied to cover the particular facts and statutory words, may be, —

That A, &c. on, &c. [if the time of day is material add it here, as explained ante, § 86, 87 [5]], at, &c. [ante, § 80], did feloniously,[6] wilfully, and maliciously [7] set fire to [*or* burn, employing the statutory expression [8]] a certain house [*or* dwelling-house, *or* shop, *or* barn, using the statutory word] of one X [ante, § 79],[9] there situate [10] [*adding*, if the statute requires], with the intent, &c. [*or* whatever else it has set down as enhancing the criminality of — that is, the punishment for — the burning]; against the peace, &c.[11]

[1] This matter in brackets adds nothing to the sense, and it is plainly not necessary. Nor is it always found even in the old indictments. For illustration, Rex *v.* Pedley, Cald. 218; Rex *v.* Scofield, Cald. 397.

[2] "And consume" not necessary; and, it is believed, not common. "Burn" is essential, but probably "set fire to" need not be added; though, in the absence of adjudications to the point, it is practically safer to employ both terms.

[3] 3 Chit. Crim. Law, 1127. And compare form in Matthews Crim. Law, 436.

[4] Ante, § 31; Crim. Proced. II. § 34, 35.

[5] As, see The State *v.* Hurley, 71 Maine, 354.

[6] Omit "feloniously" in misdemeanors.

[7] But follow the statutory words. And see ante, § 179 and note; Tuller *v.* The State, 8 Texas Ap. 501, 505.

[8] The two expressions are defined and distinguished in Stat. Crimes, § 310, 311. And see Crim. Proced. I. § 612, 613; II. § 47; Rex *v.* Smith, 4 Car. & P. 569; The State *v.* Johnson, 19 Iowa, 230; Mary *v.* The State, 24 Ark. 44.

[9] Crim. Proced. II. § 36–39.

[10] As to whether these words should be employed or not, see ante, § 179 and note.

[11] For forms, see 4 Went. Pl. 20–22; 3 Chit. Crim. Law, 1127–1131; Archb. Crim. Pl. & Ev. 19th ed. 555, 561, 563–570; Davis Prec. 49–54; 6 Cox C. C. App. 23, 102–107; Rex *v.* Hill, 20 Howell St. Tr. 1317; Rex *v.* Pedley, Cald. 218; Rex *v.* Scofield, Cald. 397; Rex *v.* Newill, 1 Moody, 458; Rex *v.* Woodward, 1 Moody, 323; Reg. *v.* Child, Law Rep. 1 C. C. 307, 12 Cox C. C. 64; Reg. *v.* Manning, Law Rep. 1 C. C. 338, 12 Cox C. C. 106; Reg. *v.* Newboult, Law Rep. 1 C. C. 344, 12 Cox C. C. 148; Hunter's Case, 1 Lewin, 3, 4; McDonald's Case, 2 Lewin, 46; Reg. *v.* Paice, 1 Car. & K. 73; Reg. *v.* Fletcher, 2 Car. & K. 215; Reg. *v.* Munson, 2 Cox C. C. 186; Reg. *v.* Lyons, 8 Cox C. C. 84, Bell, 38, 43; Reg. *v.* Batstone, 10 Cox C. C. 20; Reg. *v.* Faulkner, 13 Cox C. C. 550; Reg. *v.* Greenwood, 23 U. C. Q. B. 250; Reg. *v.* Cronin, 36 U. C. Q. B. 342.

Alabama. — Martin *v.* The State, 28 Ala. 71; Crim *v.* The State, 43 Ala. 53; Hinds *v.* The State, 55 Ala. 145; Cheatham *v.* The State, 59 Ala. 40; Walker *v.* The State, 61 Ala. 30; Hudson *v.* The State, 61 Ala. 333; Lockett *v.* The State, 63 Ala. 5.

Arkansas. — Mary *v.* The State, 24 Ark.

§ 181. *Under Particular Statutes: —*

Mill. — Under a statute making one a felon who "shall unlawfully and maliciously set fire to any church, chapel, or meeting-house, or shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, shop, mill, or granary," the allegations for the arson of a mill may be, —

That A, &c. on, &c. at, &c. did feloniously, unlawfully, and maliciously set fire to and burn one mill [there situate[1]], the property of one X [with intent thereby to injure the said X[2]]; against, &c.[3]

44; Mott *v.* The State, 29 Ark. 147, 148.

California. — People *v.* Hood, 6 Cal. 236; People *v.* Schwartz, 32 Cal. 160.

Connecticut. — The State *v.* Byrne, 45 Conn. 273.

Georgia. — McLane *v.* The State, 4 Ga. 335.

Illinois. — Staaden *v.* People, 82 Ill. 432.

Indiana. — Wolf *v.* The State, 53 Ind. 30; Johnson *v.* The State, 65 Ind. 204.

Iowa. — The State *v.* Johnson, 19 Iowa, 230.

Louisiana. — The State *v.* Gregory, 33 La. An. 737, 739.

Maine. — The State *v.* Ricker, 29 Maine, 84; The State *v.* Hurley, 71 Maine, 354.

Maryland. — Gibson *v.* The State, 54 Md. 447.

Massachusetts. — Commonwealth *v.* Macomber, 3 Mass. 254; Commonwealth *v.* Wade, 17 Pick. 395; Commonwealth *v.* Squire, 1 Met. 258; Commonwealth *v.* Harney, 10 Met. 422; Commonwealth *v.* Flynn, 3 Cush. 529; Commonwealth *v.* Barney, 10 Cush. 480; Commonwealth *v.* Lamb, 1 Gray, 493; Commonwealth *v.* Goldstein, 114 Mass. 272; Commonwealth *v.* Bradford, 126 Mass. 42; Commonwealth *v.* Allen, 128 Mass. 46.

Michigan. — McDade *v.* People, 29 Mich. 50; People *v.* Thompson, 37 Mich. 118; People *v.* Fairchild, 48 Mich. 31, 33.

Mississippi. — Lewis *v.* The State, 49 Missis. 354.

New Hampshire. — The State *v.* Livermore, 44 N. H. 386.

New Jersey. — The State *v.* Price, 6 Halst. 203.

New York. — People *v.* Bush, 4 Hill, N. Y. 133; Woodford *v.* People, 62 N. Y. 117, 119, 5 Thomp. & C. 539; Levy *v.* People, 80 N. Y. 327, 328; McGarry *v.* People, 2 Lans. 227; Peverelly *v.* People, 3 Parker C. C. 59, 61; Didieu *v.* People, 4 Parker C. C. 593; McDermott *v.* People, 5 Parker C. C. 102.

Nevada. — The State *v.* Cohn, 9 Nev. 179, 180.

North Carolina. — The State *v.* Wise, 66 N. C. 120; The State *v.* King, 69 N. C. 419; The State *v* Jaynes, 78 N. C. 504; The State *v.* Thorne, 81 N. C. 555.

Ohio. — Allen *v.* The State, 10 Ohio State, 287.

Pennsylvania. — Chapman *v.* Commonwealth, 5 Whart. 427.

South Carolina. — The State *v.* Pope, 9 S. C 273.

Texas. — Thomas *v.* The State, 41 Texas, 27, 28; Cesure *v.* The State, 1 Texas Ap. 19; Tuller *v.* The State, 8 Texas Ap. 501, 502; Bullock *v.* The State, 12 Texas Ap. 42.

Vermont. — The State *v.* Roe, 12 Vt. 93.

Virginia. — Commonwealth *v.* Posey, 4 Call, 109; Uhl *v.* Commonwealth, 6 Grat. 706; Commonwealth *v.* Page, 26 Grat. 943, 945; White *v.* Commonwealth, 29 Grat. 824.

United States. — District of Columbia. United States *v.* White, 5 Cranch C. C. 38, 73.

[1] As to these words see ante, § 179, note.

[2] Follow the statutory terms here; or, where the statute has only the words given in our text, consider whether anything is to be inserted by construction, and let the averments cover such matter if any. Otherwise there is probably no occasion for this clause.

[3] The State *v.* Jaynes, 78 N. C. 504.

§ 182. **Uninhabited Dwelling.** — Under statutory terms more complicated, making it a punishable misdemeanor to "wilfully and maliciously burn, either in the night or in the day time, any banking-house, store, manufactory, mill, barn, stable, ship, office, outhouse, or other building whatsoever of another, other than is mentioned in the third section," the indictment for burning an unfinished and uninhabited dwelling-house within the words "other building," may be, —

That A, &c. on, &c. [about the hour of twelve o'clock in the night-time of the same day [1]], at, &c. did [feloniously [2]], wilfully, and maliciously burn [3] a building of one X there situate,[4] erected for a dwelling-house and not completely finished therefor and not inhabited; against the peace, &c.[5]

§ 183. **Public Building.** — An indictment on the Vermont statute for arson of a public building may allege, —

That A, &c. on, &c. at, &c. did feloniously, wilfully, and maliciously set fire to and burn a certain public building there situate, being a meeting-house erected for the public worship of Almighty God; against the peace, &c.[6]

§ 184. **To defraud Insurer.** — The indictment for arson of one's own house to defraud insurers [7] is necessarily upon a statute, the terms whereof should be covered by the allegations.[8] Under the English 43 Geo. 3, c. 58, § 1, making it felony to "wilfully, maliciously, and unlawfully set fire to any house, &c. whether such house, &c. shall then be in the possession of the person or persons so setting fire to the same, or in the possession of any other person or persons, or of any body corporate, with intent thereby to injure or defraud his majesty, or any of his majesty's subjects, or any body corporate," the form of the indictment for the offence now in contemplation was, as given in all the books of practice, omitting obvious surplusage, —

[1] This clause is in the form now before me, but it is plainly not necessary. Ante, § 87; Crim. Proced. I. § 614.

[2] Omit "feloniously" if the offence is misdemeanor. Crim. Proced. II. § 35.

[3] "Burn" being the statutory word, it is not necessary, whatever be the common-law rule, to add "set fire to," &c. Crim. Proced. II. § 46, 47.

[4] See ante, § 179.

[5] Commonwealth *v.* Squire, 1 Met. 258. These allegations make a *prima facie* case; hence it is not necessary to say that the building is "other than is mentioned," &c. Ib.; Crim. Proced. I. § 637–639.

[6] The State *v.* Roe, 12 Vt. 93. Ownership of such a building need not be alleged. Ib.; Crim. Proced. II. § 36.

[7] Crim. Law, II. § 12, 16; Crim. Proced. II. § 45 *a*, 50.

[8] Crim. Proced. II. § 34, 35, 40, 42, 44–48.

That A, &o. on, &c. at, &c. did feloniously, wilfully, maliciously, and unlawfully set fire to a certain house there situate and then in his possession, with intent thereby to injure and defraud the London Insurance Company;[1] against the peace, &c.[2]

§ 185. **Continued.** — Following this model, an information on a Connecticut statute, making it felony in "every owner or tenant of any building who shall wilfully burn it, or anything therein, with intent to defraud another," would be good which alleged, —

That A, &c. on, &c. at, &c. did feloniously and wilfully burn a certain building, to wit, a dwelling house, then and there owned by him, with intent thereby to defraud the Republic Fire Insurance Company; against the peace, &c.[3]

§ 186. **Another's Building to defraud Insurer.** — Where one who "wilfully burns a building . . . at the time insured against loss or damage by fire, with intent to injure the insurer, whether such person is the owner of the property burnt or not," is made by statute punishable as a felon,[4] the allegation, if so are the facts, may be, —

[1] As to the methods of alleging the name of the corporation, see ante, § 79 and note, and the places there referred to.

[2] 3 Chit. Crim. Law, 1131 *b*; 2 Stark. Crim. Pl. 2d ed. 443; Crown C. C. 10th ed. by Ry. 113; Archb. Crim. Pl. & Ev. 10th Lond. ed. 313.

[3] The State *v.* Byrne, 45 Conn. 273, is before me while writing this form; but the information, which was therein held to be good, is much more voluminous and minute. It alleges that A, &c. on, &c. at, &c. "wilfully and feloniously did burn a certain building, to wit, a dwelling house there situated," adding the street and number, "of which building said A was at the time of the burning of the same as aforesaid the owner, with intent thereby to defraud the Republic Fire Insurance Company, a company duly organized and existing under the laws of the State of New York, for the purpose of carrying on a general insurance business throughout the United States, and especially in the State of Connecticut, having its principal office in the city of New York, and which said corporation had previously insured said building of said A, to him the said A, against loss by fire, to the amount of fourteen hundred dollars, by its written policy of insurance theretofore issued and delivered by it to said A, a more particular description whereof is to the attorney unknown, which said policy of insurance was at the time of the burning of said house in force as a valid policy of insurance. And so the said attorney says, that on, &c. at, &c. aforesaid, said A, being then and there the owner of said building as aforesaid, the same wilfully and feloniously did burn, with intent to defraud said insurance company out of said fourteen hundred dollars insurance as aforesaid; against the peace," &c. I know of no principle of criminal pleading rendering this particularity necessary. And it might prove embarrassing in the evidence. Nor is it usual. Consult, for kindred and illustrative forms, Commonwealth *v.* Bradford, 126 Mass. 42; Commonwealth *v.* Goldstein, 114 Mass. 272; People *v.* Schwartz, 32 Cal. 160; Johnson *v.* The State, 65 Ind. 204; Staaden *v.* People, 82 Ill. 432; Reg. *v.* Lyons, Bell C. C. 38, 8 Cox C. C. 84.

[4] Mass. Gen. Stats. c. 161, § 7.

That A, &c. on, &c. at, &c. did feloniously and wilfully burn a certain grist-mill building of one X, there situate, which building was then and there insured against loss and damage by fire, with intent thereby[1] to injure a certain insurance company called the Springfield Fire and Marine Insurance Company; against the peace, &c.[2]

§ 187. **Burning Goods to injure Insurer.** — The allegations are in like terms as for burning a building, except that the property is described according to the different fact.[3] Under two statutes, the one rendering it felony to "unlawfully and maliciously set fire to any . . . building, . . . whether . . . in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person,"[4] and the other declaring it felony to "wilfully and maliciously set fire to any goods or chattels being in any building the setting fire to which is made felony by" any statute,[5] it is good in allegation to say, —

That A, &c. on, &c. at, &c. did feloniously, wilfully, and maliciously set fire to certain goods and chattels of him the said A, to wit, one straw mattress and one thousand lucifer matches, then being in a certain building, to wit, a house, in his possession and there situate,[6] with intent thereby to defraud an insurance company known by the name of, &c.; against the peace, &c.[7]

§ 188. **Person being in House.** — Under a statute declaring it felony to "unlawfully and maliciously set fire to any dwelling-house, any person being therein,"[8] the allegations may be, —

That A, &c. on, &c. at, &c. did feloniously, unlawfully, and maliciously set fire to his own dwelling-house there situate, his wife Y being then in said dwelling-house [*or* the dwelling-house of one X there situate, the said X, and Z the wife of the said X, and another person whose name is to

[1] There is no need to add here, as in the form before me, "then and there;" because, among other reasons, the time and place of the injury meant to follow the burning are not essential elements in the offence.

[2] Commonwealth *v.* Bradford, 126 Mass. 42.

[3] For forms, see Commonwealth *v.* Goldstein, 114 Mass. 272; Reg. *v.* Child, Law Rep. 1 C. C. 307; Commonwealth *v.* Macomber, 3 Mass. 254; 6 Cox C. C. App. 23, 105–107.

[4] 7 Will. 4 & 1 Vict. c. 89, § 3.

[5] 14 & 15 Vict. c. 19, § 8.

[6] As to "there situate," see ante, § 179 and note. It is doubtful whether the possession of the house need be alleged, since the statute declares it immaterial to the constitution of the offence. See ante, § 182 and note. And as the court judicially knows that straw mattresses and lucifer matches are "goods and chattels" and a house is a "building," there seems to be no necessity for the allegation to contain these quoted words, followed by "to-wit." Crim. Proced. I. § 514, 568, 570, 612, 616, 619; Stat. Crimes, § 426, 440.

[7] Reg. *v.* Lyons, Bell C. C. 38, 43, 8 Cox C. C. 84.

[8] 24 & 25 Vict. c. 97, § 2.

the jurors unknown, being there in said dwelling-house]; against the peace, &c.[1]

§ 189. **Statutory Degrees.** — Some forms under statutes dividing arson into degrees[2] appear in the cases cited in the note.[3]

§ 190. **Accessories — Principals of Second Degree.** — In a note, also, cases are referred to containing the allegations against the accessory.[4] But, for practical use, nothing more or better is required for charging the accessory whether before or after the fact, and the principal in the second degree, than the general forms given in another chapter.[5] As to them, the offences now under consideration present no peculiarities.

II. *Attempts.*

§ 191. **Elsewhere — Here.** — In addition to the general forms for charging the attempt, given in a previous chapter,[6] it is deemed best to insert in this place some particular ones. Thus, —

§ 192. **Burning own House to burn Neighbor's.**[7] — Condensing some forms from Chitty, we have the following, believed to be good at the common law: —

That A, &c. on, &c. at, &c. [unlawfully and maliciously [8]] devising and intending to feloniously and maliciously burn and consume the house of

[1] Archb. Crim. Pl. & Ev. 10th ed. 317, 19th ed. 562; Reg. *v.* Paice, 1 Car. & K. 73; Reg. *v.* Fletcher, 2 Car. & K. 215; Levy *v.* People, 80 N. Y. 327, 328; Woodford *v.* People, 62 N. Y. 117, 119, 5 Thomp. & C. 539; Didieu *v.* People, 4 Parker C. C. 593 (finally adjudged 22 N. Y. 178). In these New York forms, the burning is properly alleged to be in the night, for so the statute requires the fact to be. But the name of the person in the house is not in all of them given; why, I have not inquired. It is in all the English forms. Possibly there may be a difference of opinion as to the necessity of alleging the name. I should recommend its insertion as, at least, the better practice, wherever its omission is not expressly sanctioned by a statute or judicial decision.

[2] Crim. Law, II. § 19; Crim. Proced. II. § 48 *a*.

[3] First degree. Woodford *v.* People, 62 N. Y. 117, 119, 5 Thomp. & C. 539; Didieu *v.* People, 4 Parker C. C. 593 (reversed, but not for any defect in the indictment, 22 N. Y. 178); Levy *v.* People, 80 N. Y. 327, 328. Second degree. Peverelly *v.* People, 3 Parker C. C. 59, 61; The State *v.* Cohn, 9 Nev. 179, 180. Third degree. McDermott *v.* People, 5 Parker C. C. 102; McGarry *v.* People, 2 Lans. 227.

[4] Levy *v.* People, 80 N. Y. 327, 328; McLane *v.* The State, 4 Ga. 335; The State *v.* Ricker, 29 Maine, 84; Hunter's Case, 1 Lewin, 3, 4; People *v.* Thompson, 37 Mich. 118.

[5] Ante, § 113–122.

[6] Ante, § 100–112.

[7] Crim. Law, I. § 765; II. § 20.

[8] When these or other similar adverbs are made to qualify the verbs "burn and consume," as in this form, I cannot see the necessity of inserting them here also, and I should think it reasonably safe to omit them. See post, § 194.

one X there situate, did then and there, with the said intent so to burn and consume the said house of X, unlawfully and maliciously set fire to and burn his own house contiguous and near thereto; against the peace, &c.[1]

§ 193. **Special Statutory Felony.** — The indictment on a statute making it felony to "unlawfully and maliciously, by any overt act, attempt to set fire to any building, &c. under such circumstances that if the same were thereby set fire to the offender would be guilty of felony,"[2] may allege, —

That A, &c. on, &c. at, &c. did feloniously, unlawfully, and maliciously attempt, by then and there, &c. [stating the overt act], to feloniously, unlawfully, and maliciously set fire to a certain building, to wit, &c. there situate and then belonging to one X [with intent thereby then and there to injure the said X[3]]; against the peace, &c.[4]

§ 194. **Another Statutory Attempt.** — Under a statute, substantially in the terms of the unwritten law, providing a punishment for "every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do an act towards the commission of such offence, but shall fail in the perpetration,

[1] 3 Chit. Crim. Law, 1129–1131 *a*. Chitty's forms are much more voluminous, but I cannot discover that this condensation omits anything which any legal person would deem essential. For other forms, see Rex *v.* Wead, 4 Went. Pl. 59, 60; Rex *v.* Broome, 4 Went. Pl. 21. And see 4 Went. Pl. 58. One of Chitty's forms — 3 Chit. Crim. Law, 1129 — is the following: —

That A, &c. on, &c. at, &c. unlawfully and maliciously devising and intending to set fire to and burn a certain house belonging to him the said A, there situate, [with force and arms, *useless*] unlawfully, wickedly, and maliciously did set fire to a certain part of the wooden floor of and belonging to the said house, which said wooden floor was then and there placed on the ground floor of the said house, which said house was then and there contiguous and near to certain dwelling-houses of and belonging to divers of the liege subjects of our said lord the king, situate at, &c. aforesaid, with a wicked intention, by means of such setting fire to the said part of the said wooden floor of and belonging to the said house of the said A, then and there unlawfully, wilfully, and maliciously to burn the said house of the said A [so far, it is plain, no offence at the common law is set out, unless the mere fact of contiguity to other houses will supply the defect. Crim. Law, I. § 318, 514, 559, 577; II. § 12, 21]; to the great damage, danger, terror, and affrightment of the liege subjects of our said lord the king near the house of the said A then and there inhabiting and dwelling, in contempt of our said lord the king and his laws, to the evil example, &c. and against the peace, &c.

Assuming the body of this indictment to charge no offence, it is not quite plain how the conclusion can make up the deficiency. Evidently it is not good for an attempt; because this requires a specific intent to burn the neighbor's house, and here the alleged intent is simply to burn his own. Crim. Law, I. § 729, 731. Still it is possibly good as for a public nuisance, but in the absence of adjudications directly sustaining it I should advise further allegations showing the publicity of the place. For the law in this view, see Crim. Law, II. § 21.

[2] 24 & 25 Vict. c. 97, § 8.

[3] This averment, which is in the form before me, is necessary only where such intent to injure constitutes, by statute, an element in the substantive burning attempted.

[4] Archb. Crim. Pl. & Ev. 19th ed. 567.

or shall be intercepted or prevented in the execution of the same,"[1] the allegations may be, —

That A, &c. on, &c. at, &c. did attempt feloniously,[2] wilfully, and maliciously to set fire to and burn[3] a certain house of one X, there situate, and in pursuance thereof did then and there place and set fire to combustible materials on certain boards under said house, with the intent feloniously and maliciously to then and there burn thereby the said house [but did then and there fail to perpetrate the offence thus intended[4]]; against the peace, &c.[5]

§ 195. **Solicitations.** — On a statute like the one quoted in the last section, or at common law, the indictment for a solicitation, which is a form of attempt,[6] may aver, —

That A, &c. on, &c. at, &c. did unlawfully and maliciously [*or*, falsely and wickedly[7]] solicit and incite[8] one B to feloniously, unlawfully, and maliciously[9] set fire to [*or* burn, *or* set fire to and burn] a certain house of one X, situate, &c.[10] [with intent to injure said X[11]]; against the peace, &c.[12]

[1] Mass. Rev. Stats. c. 133, § 12; Crim. Law, I. § 743; Crim. Proced. II. § 86.

[2] Omit this "feloniously" if the attempt is only misdemeanor.

[3] In one of the forms now before me, the collocation of these words is different; namely, "did feloniously, wilfully, and maliciously attempt to set fire to and burn." In the form given in the last section, this sort of adverb stands in both places, being repeated. Now, in both places, the offence consists, not in the attempt to burn, but to feloniously and maliciously burn — to commit the felony of malicious burning. Hence, whether we should trust to a court's overlooking an inaccuracy of expression or not, true precision requires these adverbs to stand where they will qualify "set fire to and burn." And the statute proceeded on in this section has no qualifying words to the intent. That in the last section has; therefore the form there has these words at both places.

[4] This allegation, or something like it, appears to be common in Massachusetts under the statute now in contemplation; but, in reason, such failure is not an essential part of the *prima facie* offence of attempt, therefore it is probably not necessary. See ante, § 182, first note to the form, and the places there referred to. In New York, under a statute in like terms, this allegation does not appear in the cases of attempted arson now before me, wherein the indictments were sustained. People *v.* Bush, 4 Hill, N. Y. 133; McDermott *v.* People, 5 Parker C. C. 102. And see Crim. Proced. II. § 86; post, § 260.

[5] Commonwealth *v.* Flynn, 3 Cush. 529; Commonwealth *v.* Harney, 10 Met. 422. For other forms, see The State *v.* Johnson, 19 Iowa, 230; Uhl *v.* Commonwealth, 6 Grat. 706; McDade *v.* People, 29 Mich. 50.

[6] Ante, § 105, 106.

[7] People *v.* Bush, 4 Hill, N. Y. 133. Or omit these words, see note to the last section.

[8] Crim. Proced. II. § 74.

[9] *Add*, "in the night time," where such is an element in the offence solicited.

[10] It is not necessary, in point of law, that the house should be located in the county of the solicitation. Crim. Proced. I. § 57.

[11] See ante, § 193 and note.

[12] People *v.* Bush, supra; People *v.* Thompson, 37 Mich. 118; McDermott *v.* People, 5 Parker C. C. 102. And see 3 Chit. Crim. Law, 1129; post, § 258.

III. *Practical Suggestions.*

§ 196. **Joining Substantive Offence and Attempt.** — By the rules of the common law, the misdemeanor of an attempt to commit the felony of arson cannot be joined in an indictment for the felony. But generally, in our States, the obstacle is in one way or another removed by legislation;[1] and, where it does not interpose, the judicious prosecuting officer will, in all cases of possible doubt as to the completion of the offence, so shape his allegations that the conviction may be for the attempt should no more be proved. So, —

§ 197. **Ownership.** — If it is uncertain who will be shown at the trial to have been the owner of the structure burned, counts should be joined laying the ownership in different persons.[2] But —

§ 198. **Methods of Offending.** — We have seen that the forms do not specify the manner of a substantive burning, yet they do that of an attempt. Still, for neither is it ordinarily necessary or judicious to allege different means in different counts; but, where there is no repugnance, it is better to lay in one count all the ways within the probable proofs, and then the charge will be sustained by showing enough to constitute an offence.[3]

§ 199. **The Defendant** — will avail himself of the mistakes of the prosecuting officer and the weakness of his proofs. And, as in most cases the evidence will be circumstantial, he will have the usual facilities for creating doubts[4] which this species of evidence affords.

[1] Crim. Law, I. § 804–809; The State *v.* Sloanaker, 1 Houst. Crim. 62, 65.

[2] Compare with ante, § 160.

[3] Ante, § 19 et seq.

[4] Ante, § 162.

CHAPTER XIV.

ASSAULT AND BATTERY.[1]

§ 200. **How Chapter divided.** — We shall consider, I. The Indictment in General; II. Special Forms and Aggravations; followed by, III. Practical Suggestions.

I. *The Indictment in General.*

§ 201. **Simple Assault and Battery at Common Law.** — Chitty's form is, —

That A, &c. on, &c. [with force and arms [2]], at, &c. in and upon one X [in the peace of God and our Lord the King then and there being [3]], did make an assault [thus far an assault is alleged, what follows is a charge of a battery [4]], and him the said X then and there did beat, bruise, wound, and ill-treat [so that his life was greatly despaired of [5]], [and other wrongs to the said X then and there did [6]]; [to the great damage of the said X [7]], and against the peace, &c.[8]

[1] For direct discussions of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 22–62, 69 *a*–72 *e*; Crim. Proced. II. § 54–70 *a*; Stat. Crimes, § 500–515. Incidental, Crim. Law, I. § 260, 265, 413, note, 422, 470, 548, 553, 736, 746, 788, 792, 795, 843, 861, 862, 867; II. § 698–713; Crim. Proced. I. § 82, 411, 413, 437, 438, note, 452, 469, 481, note, 548, 617; II. § 6 *a*, 25, 26, 77–85, 297, 303, 366, 512, 513, 554, 579, 646, 651–654, 658, 692, 859, 881–883, 955, 992, 993, 1000; Stat. Crimes, § 216, 320, note, 496–499, 744.

[2] Not necessary. Ante, § 43.

[3] Unnecessary. Ante, § 47, and places there referred to.

[4] Crim. Proced. II. § 56.

[5] Chitty recommends the omission of these words "when only a slight assault can be proved." 3 Chit. Crim. Law, 821, note. They are never necessary. Crim. Proced. II. § 55 and note. Practically, if, in an extreme case, the pleader wishes to state anything of the sort, it will be better to give the pertinent facts, and not the "despair" of unnamed third persons.

[6] In reason, these indefinite words cannot afford foundation for any proofs. And it is believed that the courts will so treat them. Crim. Proced. II. § 57. Plainly, then, it is practically best to omit them.

[7] Unnecessary. Ante, § 48; Crim. Proced. II. § 57.

[8] 3 Chit. Crim. Law, 821.

§ 202. **Greater Particularity of Charge.** — Where the facts are specially aggravated, and the pleader wishes to set them out more fully, as ground for appealing to the discretion of the court to inflict a heavier punishment, or as in law requiring it,[1] he will introduce them in language expressing the truth of the individual case; for example, to follow a common form, —

[After proceeding as in the last form down to "and ill-treat," add]: and the said A did then and there with both his hands violently cast, fling, and throw the said X to, upon, and against a certain brick floor there; and him the said X, in and upon his head, neck, breast, back, sides, and other parts of his body, with both the feet of him the said A then and there violently and grievously did kick, strike, and beat, giving to the said X then and there, as well by such flinging, casting, and throwing of him the said X as also by such kicking, striking, and beating of the said X as aforesaid, in and upon the head, neck, breast, sides, back, and other parts of the body of him the said X, divers bruises, hurts, and wounds; against the peace, &c.[2]

§ 203. **As to which,** — if a statute makes such matter essential to a higher punishment to be inflicted, it must be alleged; but, where the purpose is only to move the discretion of the court, it may as well be presented on the hearing for sentence.[3] With us, the statutes point out most of the aggravations worthy of notice, and affix to each its particular consequence; so that the indictment necessarily alleges, in the statutory words, this aggravating matter, and there is little practical temptation, unless perhaps in the States where the jury assess the punishment, to add anything more in aggravation.

§ 204. **Statutory Assaults and Batteries** — are ordinarily alleged in the same terms as those at the common law.[4] The principal exception[5] is in —

[1] Crim. Law, II. § 42, 43, 50; Crim. Proced. II. § 63, 63 *a*.

[2] 3 Chit. Crim. Law, 821, 822.

[3] Crim. Proced. I. § 77 et seq.; Crim. Law, I. § 934, 948–950.

[4] Stat. Crimes, § 500, 514, 515. See ante, § 31, 32.

[5] *Iowa.* — It is enacted in Iowa, that the information before a justice of the peace "must contain . . . a statement of the acts constituting the offence in ordinary and concise language, and the time and commission of the offence, as near as may be." Thereupon it was adjudged not sufficient to aver, that, at a time and place named, the defendants "did wilfully and maliciously assault one Bridget McCoy, contrary to the statute in such cases made and provided, and against the peace and dignity of said State." Miller, C. J. observed, that "the information in this case fails to comply with this provision of the statute, in that the 'acts constituting the offence' are not stated therein. It accuses the defendants with committing an assault, for that they committed an assault. It would not do to accuse a person with the crime of larceny, and merely allege that he

§ 205. **Indiana.** — In this State there are no common-law crimes,[1] though in other respects the common law pervades its criminal as well as civil jurisprudence.[2] The statutes making assault and battery punishable have a particular definition for "assault," and another for "assault and battery," into which that for assault does not enter as an element. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." "Every person who in a rude, insolent, or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery." And the courts hold, that the indictment, whether for assault or for assault and battery, must cover these respective statutory terms.[3] Hence, while there are some varieties in the forms which have been approved, the following will probably suffice, yet admit of little or no abridgment: —

For assault, —

That A, &c. on, &c. at, &c. did unlawfully attempt, having then and there the present ability, to commit a violent injury on the person of one X [by then and there in a threatening manner striking at and near said X with a walking-stick[4]]; against the peace, &c.

For assault and battery, —

That A, &c. on, &c. at, &c. [in and upon one X did unlawfully make an assault[5]], and in a rude manner [*or* insolent manner, *or* angry manner, *or*

committed larceny at a time and place stated. The acts which in law constitute larceny must be alleged. So in respect to every criminal offence. It will not do to accuse a party with the commission of a crime by its technical name merely. The acts which make up the offence must be charged. This was so without the statute." The State *v.* Murray, 41 Iowa, 580, 581. Still the difference between this form and the ordinary one at common law is slight. Its words are, "did wilfully and maliciously assault one X;" those of the common-law form are, "Upon one X did make an assault." The common-law form seems to be justifiable only on the grounds of long-continued usage, and the lack of language to express the somewhat complicated idea more minutely. Crim. Proced. I. § 493, 494, 497. I do not discover that such form is deemed inadequate in Iowa. See, for example, The State *v.* Newton, 44 Iowa, 45.

[1] Crim. Law, I. § 35.

[2] Bishop First Book, § 58 and note.

[3] Stat. Crimes, § 512, 513; and compare with § 514, 515.

[4] I do not think the Indiana reports contain any decisions on the sufficiency of the allegation for a simple assault, where nothing is joined to it. The adjudications have been on the simple-assault part of the indictment for an assault and battery or for an aggravated assault. In such a case, the acts performed in aggravation may stand in the place of what I have here set down in brackets. But, in the absence of such acts in averment, it seems to me, in principle, that such matter as I have inserted in these brackets, shaped to suit the particular facts, ought to be introduced; the indictment without it being too indefinite. See Crim. Proced. II. § 86–92.

[5] These words are in the form in The State *v.* Philley, 67 Ind. 304, and in some

rude, insolent, and angry manner] did then and there unlawfully touch [with his clenched fist, *or* with a stick held in his hand, *or* with the butt end of a gun [1]] the said X; against the peace, &c.[2]

Or, what is practically better, putting the indictment into such form that there may be a conviction for assault if the proof of the alleged battery fails, —

That A, &c. on, &c. at, &c. did unlawfully attempt, having then and there the present ability, to commit a violent injury on the person of one X, and therein did then and there, in a rude, insolent, and angry manner, unlawfully touch [with, &c. as before [3]] the said X; against the peace, &c.[4]

For an aggravated assault, or an aggravated assault and battery, it is good and customary to employ the appropriate one of the foregoing forms; weaving into or introducing after it, before the conclusion, the aggravating matter. The pleader may say, for example, "by," &c. following in substance the statutory terms.[5]

others; but, as by the Indiana decisions they are inadequate to charge an assault, I cannot see that they are of any use.

[1] None of these words, or their equivalents, are in the form in The State *v.* Philley, supra. Query, whether something should not be added to the word "touch" to make the charge more specific. And see the note before the last. If, as, for example, in Agee *v.* The State, 64 Ind. 340, the indictment proceeds, "by," &c. setting out some statutory aggravation, that, of course, will suffice. In like manner, some of the forms say "touch, beat, bruise," &c.; and I do not see any weighty objection to this method of averment.

[2] The State *v.* Philley, supra; The State *v.* Wright, 52 Ind. 307.

[3] See the note to the last form.

[4] The form in Dickinson *v.* The State, 70 Ind. 247, 250, which I have not copied very closely, is drawn on this idea. And see McCulley *v.* The State, 62 Ind. 428.

[5] Cases containing forms under the several paragraphs of this section are Nash *v.* The State, 7 Ind. 666; The State *v.* Farley, 14 Ind. 23; Rice *v.* The State, 16 Ind. 298; McCarty *v.* The State, 16 Ind. 310; Carder *v.* The State, 17 Ind. 307; The State *v.* Murphy, 21 Ind. 441; Wall *v.* The State, 23 Ind. 150; The State *v.* Miller, 27 Ind. 15; Adell *v.* The State, 34 Ind. 543, 544; Hamilton *v.* The State, 36 Ind. 280; Sloan *v.* The State, 42 Ind. 570; Williams *v.* The State, 47 Ind. 568; Greer *v.* The State, 50 Ind. 267; Ryan *v.* The State, 52 Ind. 167; The State *v.* Wright, 52 Ind. 307; The State *v.* Throckmorton, 53 Ind. 354; Harris *v.* The State, 54 Ind. 2, 3; The State *v.* Prather, 54 Ind. 63; Jarrell *v.* The State, 58 Ind. 293; The State *v.* Hubbs, 58 Ind. 415; The State *v.* Neff, 58 Ind. 516; Jones *v.* The State, 60 Ind. 241; The State *v.* Morgan, 62 Ind. 35; McCulley *v.* The State, 62 Ind. 428; Greenwood *v.* The State, 64 Ind. 250; Agee *v.* The State, 64 Ind. 340; Hughes *v.* The State, 65 Ind. 39; The State *v.* Hattabough, 66 Ind. 223; The State *v.* Philley, 67 Ind. 304; Pierce *v.* The State, 67 Ind. 354; Howard *v.* The State, 67 Ind. 401; Shinn *v.* The State, 68 Ind. 423; Dickinson *v.* The State, 70 Ind. 247, 250; Slusser *v.* The State, 71 Ind. 280; Bryant *v.* The State, 72 Ind. 400; The State *v.* Maddox, 74 Ind. 105; The State *v.* Smith, 74 Ind. 557; Pierce *v.* The State, 75 Ind. 199; Hays *v.* The State, 77 Ind. 450.

§ 206. **General Formula.** — Leaving out of view the peculiarities of the Indiana practice, we may set down the following as a general formula for the indictment: —

That A, &c. [ante, § 74–77] on, &c. at, &c. [ante, § 80] did [wilfully and feloniously [1]], with an axe [*or*, &c. specifying any other weapon which by statute aggravates the punishment [2]], make an assault [3] on one X [ante, § 79; if X was an officer in the execution of his office, or other special person, and this fact enhances as of law the punishment, aver it here], and him the said X [so executing his said office] did then and there beat, wound, and ill-treat [4] [adding here any other act rendered by the statute essential to the punishment sought to be inflicted]; with the intent, &c. [setting out, in the statutory terms, any such special intent]; against the peace, &c. [ante, § 66–69].[5]

[1] "Feloniously" should be limited to those attempts which the statute makes felonies. Crim. Proced. I. § 533–537. "Wilfully" is required only when the word is in the statute. Ib. II. § 58.

[2] Crim. Proced. II. § 63 *a*, 64.

[3] Ib. § 57, 58. The word "assault" is not so technical as not to admit of a substitute. Reg. *v.* Taylor, Law Rep 1 C. C. 194; Reg. *v.* Canwell, 11 Cox C. C. 263.

[4] No one of these verbs is essential to the extent of not admitting of a substitute. They, or "beat, bruise, wound, and ill-treat," have in most circumstances, from early times, been commonly employed. I presume "beat" alone will suffice, though I have before me no authorities to the point. "Ill-treat" is, in reason, too indefinite to be of any effect, nor is there apparently any propriety in continuing its use.

[5] For forms for the various sorts of assault and assault and battery, simple and aggravated, see 2 Chit. Crim. Law, 50, 99, 126–133, 137, 138, 144, 146, 155, 157, 201, 202, 208, 504, 538, 553, 555; 3 Ib. 788, 789, 791, 792, 794, 795, 798, 807, 809, 816, 817, 821–841, 862, 1096; 4 Went. Pl. 60, 63, 70, 71, 73, 310, 311, 314, 387, 392, 394; 6 Ib. 392, 394, 435; Rex *v.* Devonshire, Trem. P. C. 188; Rex *v.* Colepeppar, Trem. P. C. 190; Rex *v.* Pick, Trem. P. C. 240; Rex *v.* Holles, Trem. P. C. 294; Rex *v.* Giles, 7 Howell St. Tr. 1129; Rex *v.* Bethel, 8 Howell St. Tr. 747; Rex *v.* Anglesea, 18 Howell St. Tr. 197; Rex *v.* Osmer, 5 East, 304; Rex *v.* Brady, 1 B. & P. 187; Reg. *v.* Mitchell, 2 Q. B. 636; Reg. *v.* Pelham, 8 Q. B. 959, 2 Cox C. C. 17; Reg. *v.* Crespin, 11 Q. B. 913; Reg. *v.* Elrington, 1 B. & S. 688; Reg. *v.* Taylor, Law Rep. 1 C. C. 194, 11 Cox C. C. 261; Sinclair's Case, 2 Lewin, 49; Elmsly's Case, 2 Lewin, 126; Henshall's Case, 2 Lewin, 135; Rex *v.* Williams, 1 Leach, 4th ed. 529; Rex *v.* Mathews, 2 Leach, 4th ed. 584; Rex *v.* Phipoe, 2 Leach, 4th ed. 673; Rex *v.* Monteth, 2 Leach, 4th ed. 702; Rex *v.* Brady, 2 Leach, 4th ed. 803; Rex *v.* Towle, Russ. & Ry. 314; Rex *v.* Ford, Russ. & Ry. 329; Rex *v.* Voke, Russ. & Ry. 531; Rex *v.* Rosinski, 1 Moody, 19, 1 Lewin, 11; Rex *v.* Withers, 1 Moody, 294; Rex *v.* Briggs, 1 Moody, 318, 1 Lewin, 61; Rex *v.* Hood, 1 Moody, 281; Reg. *v.* Cruse, 2 Moody, 53, 8 Car. & P. 541; Reg. *v.* Crawford, 1 Den. C. C. 100, 2 Car. & K. 129; Reg. *v.* Cooper, 1 Den. C. C. 459, 3 Cox C. C. 559, 2 Car. & K. 876; Reg. *v.* Hogan, 2 Den. C. C. 277, 5 Cox C. C. 255; Reg. *v.* Phillpot, Dears. 179; s. c. nom. Reg. *v.* Philpott, 6 Cox C. C. 140; Reg. *v.* Furguson, Dears. 427, 6 Cox C. C. 454; Reg. *v.* Yeadon, Leigh & C. 81, 9 Cox C. C. 91; Reg. *v.* Porter, Leigh & C. 394, 9 Cox C. C. 449; Reg. *v.* Johnson, Leigh & C. 632, 10 Cox C. C. 114; Reg. *v.* Shannon, Jebb, 209; Reg. *v.* Oulaghan, Jebb, 270; Reg. *v.* Dilworth, 2 Moody & R. 531; Rex *v.* Smith, 2 Car. & P. 449; Rex *v.* Shadholt, 5 Car. & P. 504; Rex *v.* Butler, 6 Car. & P. 368; Reg. *v.* Button, 8 Car. & P. 660; Reg. *v.* Martin, 9 Car. & P. 215; Reg. *v.* St. George, 9 Car. & P. 483; Reg. *v.* Lewis, 9 Car. & P. 523; Reg. *v.* Pearce, 9 Car. & P. 667; Reg. *v.* Douglas, Car. & M. 193; Reg. *v.* March, 1 Car. & K. 496; Reg. *v.*

§ 207. **Less Technical.** — The books contain forms less technical than the foregoing, yet doubtless good. They are seldom used in modern practice. Thus, —

§ 208. **With Dog.** — If one, being near another with a dog,

James, 1 Car. & K. 530; Reg. *v.* Hanson, 2 Car. & K. 912, 4 Cox C. C. 138; Reg. *v.* McGavaron, 3 Car. & K. 320, 6 Cox C. C. 64; Shea *v.* Reg. 3 Cox C. C. 141; Reg. *v.* Donovan, 4 Cox C. C. 399; Reg. *v.* Bird, 5 Cox C. C. 11, 12; Reg. *v.* May, 5 Cox C. C. 176; Reg. *v.* S. 5 Cox C. C. 279; Reg. *v.* Heppingstall, 8 Cox C. C. 111; Reg. *v.* Canwell, 11 Cox C. C. 263; Reg. *v.* Macpherson, Law Rep. 3 P. C. 268, 11 Cox C. C. 604; Reg. *v.* Smith, 14 Cox C. C. 398; 6 Cox C. C. App. 18, 24–46, 108, 109, 117; Reg. *v.* McEvoy, 20 U. C. Q. B. 344; Reg. *v.* Shaw, 23 U. C. Q. B. 616; Reg. *v.* Richardson, 46 U. C. Q. B. 375.

Alabama. — Ben *v.* The State, 22 Ala. 9; The State *v.* Clarissa, 11 Ala. 57; Shaw *v.* The State, 18 Ala. 547; Reeves *v.* The State, 20 Ala. 33, 35; Thompson *v.* The State, 25 Ala. 41; Clark *v.* The State, 46 Ala. 317; Higginbotham *v.* The State, 50 Ala. 133; Wood *v.* The State, 50 Ala. 144; Meredith *v.* The State, 60 Ala. 441.

Arkansas. — Robinson *v.* The State, 5 Pike, 659; Sullivant *v.* The State, 3 Eng. 400; McCoy *v.* The State, 3 Eng. 451; Cole *v.* The State, 5 Eng. 318; Charles *v.* The State, 6 Eng. 389; The State *v.* Lonon, 19 Ark. 577; Milan *v.* The State, 24 Ark. 346, 348; The State *v.* Seely, 30 Ark. 162; Lacefield *v.* The State, 34 Ark. 275; Butler *v.* The State, 34 Ark. 480.

California. — People *v.* War, 20 Cal. 117; People *v.* English, 30 Cal. 214; People *v.* O'Neil, 48 Cal. 257; People *v.* Swenson, 49 Cal. 388; People *v.* Alibez, 49 Cal. 452; People *v.* Vierra, 52 Cal. 451; People *v.* Girr, 53 Cal. 629; People *v.* Garcia, 58 Cal. 102.

Connecticut. — The State *v.* Danforth, 3 Conn 112; Southworth *v.* The State, 5 Conn. 325; The State *v.* Nichols, 8 Conn. 496; The State *v.* Wells, 31 Conn. 210.

Florida. — Warrock *v.* The State, 9 Fla. 404; Sherman *v.* The State, 17 Fla. 888.

Georgia. — The State *v.* Howell, 1 Ga. Dec. 158; Monday *v.* The State, 32 Ga. 672; Jones *v.* The State, 37 Ga. 51; Prior *v.* The State, 41 Ga. 155; Hansford *v.* The State, 54 Ga. 55; Bard *v.* The State, 55 Ga. 319; Plain *v.* The State, 60 Ga. 284.

Illinois. — Curtis *v.* People, Breese, 197; Curtis *v.* People, 1 Scam. 285; Nixon *v.* People, 2 Scam. 267; Conolly *v.* People, 3 Scam. 474; Beckwith *v.* People, 26 Ill. 500; Hanrahan *v.* People, 91 Ill. 142, 144.

Indiana. — Cases cited ante, § 205.

Iowa. — Dollarhide *v.* United States, Morris, 233; The State *v.* McClintock, 1 Greene, Iowa, 392; The State *v.* McClintock, 8 Iowa, 203; The State *v.* Murray, 41 Iowa, 580; The State *v.* Newton, 44 Iowa, 45; The State *v.* Graham, 51 Iowa, 72. And see ante, § 204, note.

Kansas. — Millar *v.* The State, 2 Kan. 174; The State *v.* Finley, 6 Kan. 366; The State *v.* White, 14 Kan. 538; The State *v.* Bybee, 17 Kan. 462; The State *v.* Miller, 25 Kan. 699.

Kentucky. — Commonwealth *v.* Hawkins, 11 Bush, 603.

Louisiana. — The State *v.* Green, 7 La. An. 518; The State *v.* Munro, 12 La. An. 625; The State *v.* Thomas, 29 La. An. 601; The State *v.* Bradford, 33 La. An. 921; The State *v.* Richards, 33 La. An. 1294.

Maine. — The State *v.* Roberts, 26 Maine, 263; The State *v.* Palmer, 35 Maine, 9; The State *v* Blake, 39 Maine, 322; The State *v.* Dearborn, 54 Maine, 442; The State *v.* Goddard, 69 Maine, 181.

Maryland. — Davis *v.* The State, 3 Har. & J. 154; The State *v.* Dent, 3 Gill & J. 8; The State *v.* Bell, 27 Md. 675; Hollohan *v.* The State, 32 Md. 399.

Massachusetts. — Commonwealth *v.* Lanigan, 2 Law Reporter (old), 49; Commonwealth *v.* Hunt, 4 Pick. 252; Commonwealth *v.* Kennard, 8 Pick. 133; Commonwealth *v.* Gallagher, 6 Met. 565; Commonwealth *v.* Hastings, 9 Met. 259; Commonwealth *v.* Peters, 12 Met. 387; Commonwealth *v.* Kirby, 2 Cush. 577, 579; Commonwealth *v.* McLaughlin, 12 Cush. 612; Commonwealth *v.* Randall, 4 Gray, 36; Commonwealth *v.* Ford, 5 Gray, 475; Commonwealth *v.* Creed, 8 Gray, 387; Commonwealth *v.* Lang, 10 Gray, 11; Commonwealth *v.* Sanborn, 14 Gray, 393;

incites it to bite him, this is undoubtedly an assault; and, if it does bite him, a battery also; and there is no reason why the

Commonwealth *v.* Bradley, 16 Gray, 241; Commonwealth *v.* Nickerson, 5 Allen, 518; Commonwealth *v.* Galavan, 9 Allen, 271; Commonwealth *v.* Stoddard, 9 Allen, 280; Commonwealth *v.* Eagan, 103 Mass. 71; Commonwealth *v.* O'Brien, 107 Mass. 208; Commonwealth *v.* Tobin, 108 Mass. 426; Commonwealth *v.* Bearse, 108 Mass. 487; Commonwealth *v.* McGrath, 115 Mass. 150; Commonwealth *v.* Thompson, 116 Mass. 346; Commonwealth *v.* Ducey, 126 Mass. 269; Commonwealth *v.* Blaney, 133 Mass. 571.

Michigan. — Shannon *v.* People, 5 Mich. 71; People *v.* McDonald, 9 Mich. 150; Rice *v.* People, 15 Mich. 9, 15; Hanna *v.* People, 19 Mich. 316; People *v.* Lynch, 29 Mich. 274.

Minnesota. — The State *v.* Dineen, 10 Minn. 407; The State *v.* Garvey, 11 Minn. 154, 161.

Mississippi. — Ainsworth *v.* The State, 5 How. Missis. 242; Jones *v.* The State, 11 Sm. & M. 315; Morgan *v.* The State, 13 Sm. & M. 242; Brantley *v.* The State, 13 Sm. & M. 468; Sarah *v.* The State, 28 Missis. 267; Williams *v.* The State, 42 Missis. 328.

Missouri. — The State *v.* Bray, 1 Misso. 180; The State *v.* Comfort, 5 Misso. 357; Ruby *v.* The State, 7 Misso. 206; Jennings *v.* The State, 9 Misso. 862; McComas *v.* The State, 11 Misso. 116; Carrico *v.* The State, 11 Misso. 579; The State *v.* Jordan, 19 Misso. 212; The State *v.* Anderson, 19 Misso. 241; The State *v.* Magrath, 19 Misso. 678; The State *v.* Freeman, 21 Misso. 481; The State *v.* Bohannon, 21 Misso. 490; The State *v.* Chandler, 24 Misso. 371; The State *v.* Greenhalgh, 24 Misso. 373; The State *v.* Dalton, 27 Misso. 13; The State *v.* Davis, 29 Misso. 391, 395; The State *v.* Thompson, 30 Misso. 470; The State *v.* McDonald, 67 Misso. 13, 15; The State *v.* Chumley, 67 Misso. 41; The State *v.* Little, 67 Misso. 624; The State *v.* Hays, 67 Misso. 692; The State *v.* Harper, 69 Misso. 425; The State *v.* Van Zant, 71 Misso. 541; The State *v.* Painter, 67 Misso. 84.

Nebraska. — Fisk *v.* The State, 9 Neb. 62, 63.

Nevada. — The State *v.* Lawry, 4 Nev. 161; The State *v.* O'Flaherty, 7 Nev. 153; The State *v.* Roderigas, 7 Nev. 328, 330; The State *v.* Robey, 8 Nev. 312.

New Hampshire. — The State *v.* Rollins, 8 N. H. 550; The State *v.* Calligan, 17 N. H. 253; The State *v.* Hilton, 32 N. H. 285; The State *v.* Bean, 36 N. H. 122; The State *v.* Webster, 39 N. H. 96; The State *v.* Hardy, 47 N. H. 538; The State *v.* Roberts, 52 N. H. 492.

New Jersey. — The State *v.* Mairs, Coxe, 453.

New York. — People *v.* McKinnon, 1 Wheeler Crim. Cas. 170; People *v.* Moore, 3 Wheeler Crim. Cas. 82; People *v.* Holcomb, 3 Parker C. C. 656; People *v.* Davis, 4 Parker C. C. 61; O'Leary *v.* People, 4 Parker C. C. 187; Nelson *v.* People, 5 Parker C. C. 39; La Beau *v.* People, 6 Parker C. C. 371; Lenahan *v.* People, 5 Thomp. & C. 265; People *v.* White, 55 Barb. 606; People *v.* Pettit, 3 Johns. 511; Dawson *v.* People, 25 N. Y. 399; People *v.* Casey, 72 N. Y. 393, 394; Pontius *v.* People, 82 N. Y. 339.

North Carolina. — The State *v.* Sam, 2 Dev. 567; The State *v.* Tom, 2 Jones, N. C. 414; The State *v.* Sprinkle, 65 N. C. 463; The State *v.* Scott, 72 N. C. 461; The State *v.* Dancy, 83 N. C. 608.

Ohio. — White *v.* The State, 13 Ohio State, 569; O'Meara *v.* The State, 17 Ohio State, 515.

Oregon. — The State *v.* Doty, 5 Oregon, 491.

Pennsylvania. — Stout *v.* Commonwealth, 11 S. & R. 177; Hunter *v.* Commonwealth, 29 Smith, Pa. 503; Mears *v.* Commonwealth, 2 Grant, Pa. 385.

South Carolina. — The State *v.* Hailey, 2 Strob. 73; The State *v.* McKettrick, 14 S. C. 346, 348.

Tennessee. — Haslip *v.* The State, 4 Hayw. 273; Evans *v.* The State, 1 Humph. 394; The State *v.* Freels, 3 Humph. 228; Williams *v.* The State, 8 Humph. 585; The State *v.* McCarn, 11 Humph. 494; Harrison *v.* The State, 2 Coldw. 232; Nevills *v.* The State, 7 Coldw. 78; Dillard *v.* The State, 3 Heisk. 260; Brown *v.* The State, 6 Baxter, 422; Logan *v.* The State, 2 Lea, 222; The State *v.* Saylor, 6 Lea, 586.

Texas. — The State *v.* Rutherford, 13

offence should not be charged in the ordinary way according to the legal effect of the act. But it may equally well be alleged according to its outward form;[1] and, for the latter, Chitty furnishes the following precedent: —

That A, &c. on, &c. at, &c. did unlawfully incite, provoke, and encourage a certain dog of and belonging to him the said A to bite one X, by means whereof the same dog did then and there grievously bite the said X in and upon the right leg of him the said X, thereby then and there grievously hurting and wounding the said leg of him the said X; against the peace, &c.[2]

§ 209. **Driving against Carriage.** — On the same principle proceeds the following precedent, while yet the common form would doubtless be equally good: —

That A, &c. on, &c. at, &c. in the public highway there, unlawfully, wilfully, and violently did drive and force a certain horse and cart, under his care and guidance, at and against a certain chaise drawn by two horses, under the care of one X, by means whereof the said X was then and there

Texas, 24; The State *v.* Davis, 26 Texas, 201; The State *v.* Nations, 31 Texas, 561; The State *v.* Killough, 32 Texas, 74; The State *v.* Bradley, 34 Texas, 95; Blackburn *v.* The State, 39 Texas, 153; Bittick *v.* The State, 40 Texas, 117; The State *v.* Walker, 40 Texas, 485; The State *v.* Coffey, 41 Texas, 46; Crow *v.* The State, 41 Texas, 468; The State *v.* Thompson, 41 Texas, 523; The State *v.* Hartman, 41 Texas, 562; Gorman *v.* The State, 42 Texas, 221; Mayfield *v.* The State, 44 Texas, 59; Green *v.* The State, 1 Texas Ap. 82; Browning *v.* The State, 1 Texas Ap. 96; Johnson *v.* The State, 1 Texas Ap. 130; Browning *v.* The State, 2 Texas Ap. 47, 49; Coney *v.* The State, 2 Texas Ap. 62; Wilks *v.* The State, 3 Texas Ap. 34; Montgomery *v.* The State, 4 Texas Ap. 140; Greenlee *v.* The State, 4 Texas Ap. 345, 346; Davis *v.* The State, 4 Texas Ap. 456, 458; Curry *v.* The State, 4 Texas Ap. 574, 576; Battle *v.* The State, 4 Texas Ap. 595; Payne *v.* The State, 5 Texas Ap. 35; Tucker *v.* The State, 6 Texas Ap 251; Strickland *v.* The State, 7 Texas Ap. 34, 36; Hunt *v.* The State, 9 Texas Ap. 404; Smith *v.* The State, 9 Texas Ap. 475; Meier *v.* The State, 10 Texas Ap. 39; Scott *v.* The State, 12 Texas Ap. 31; Sanford *v.* The State, 12 Texas Ap. 196.

Vermont. — The State *v.* Hobbs, 2 Tyler, 380; The State *v.* Hooker, 17 Vt. 658.

Virginia. — Commonwealth *v.* Booth, 2 Va. Cas. 394; Commonwealth *v.* Nutter, 8 Grat. 699; Christian *v.* Commonwealth, 23 Grat. 954; Hoback *v.* Commonwealth, 28 Grat. 922; Murphy *v.* Commonwealth, 23 Grat. 960; Randall *v.* Commonwealth, 24 Grat. 644; Baccigalupo *v.* Commonwealth, 33 Grat. 807.

West Virginia. — Crookham *v.* The State, 5 W. Va. 510, 511; The State *v.* Stewart, 7 W. Va. 731; The State *v.* Newsom, 13 W. Va 859.

Wisconsin. — Rountree *v.* United States, 1 Pin. 59; Moore *v.* The State, 3 Pin. 373; Haney *v.* The State, 5 Wis. 529; Kilkelly *v.* The State, 43 Wis. 604; Sullivan *v.* The State, 44 Wis. 595.

United States. — United States *v.* Howard, 3 Sumner, 12; United States *v.* Harriman, 1 Hughes, 525; United States *v.* Lyles, 4 Cranch C. C. 469; United States *v.* Lloyd, 4 Cranch C. C. 472.

[1] The doctrine is explained Crim. Proced. I § 332–335.

[2] 3 Chit. Crim. Law, 823. For another form for setting a dog on a man, see Rex *v.* Pick, Trem. P. C. 240.

thrown from and off the said chaise, to and against the ground, and was thereby put in great peril and danger of his life; against the peace, &c.[1]

§ 210. **Statutory Forms.** — There are, in some of our States, forms specially authorized by statutes; the result whereof is, that, when they are constitutionally good, not all being so,[2] the pleader has his election to employ them instead of those of the common law.[3] But the latter are as simple as one could desire; and, in the absence of adjudication, the judicious prosecuting officer will avoid the risk of following any statutory form simpler than the common law requires.

II. *Special Forms and Aggravations.*

§ 211. **Elsewhere.** — Under the titles Homicide, Mayhem and Statutory Maims, Rape, Robbery, and Sodomy, will be given the forms for assaults and assaults and batteries with intent to kill, to maim, to ravish, to rob, and to commit the crime against nature. Also under the title Obstructing Justice and Government the forms will appear for assaults on officers and their assistants in the execution of their offices. And, in general, where an offence consists in part of an assault or a battery, the form for the whole will be set out under the title of the offence. So, likewise, under Neglects, will appear allegations in the nature of those for assault and battery.

§ 212. **With Weapon.** — For assault or assault and battery with a "deadly weapon," a "dangerous weapon," a "gun," an "offensive weapon," or other instrument of violence specified by statute, the pleader should adhere to the statutory terms. His allegations may be, for example, if so they duly cover those terms, —

That A, &c. on, &c. at, &c. did, with a loaded gun [*or*, with a deadly iron bar which he held in his hand, *or*, with a certain dangerous weapon, to wit, a pistol called a revolver loaded with powder and ball[4]], feloni-

[1] 3 Chit. Crim. Law, 825. And see 823.

[2] Allen *v.* The State, 13 Texas Ap. 28. See Crim. Proced. I. § 86–88, 98 *a*–112.

[3] For the form for assault, made good by statute in Alabama, and sustained judicially, see Thompson *v.* The State, 25 Ala. 41.

[4] Where the instrument is designated in the statute by the term "dangerous weapon," "deadly weapon," or other like general expression, it is the more exact method to employ in allegation the statutory words, adding also the common name of the particular weapon. But the latter alone will suffice where the court can see,

ously [1] make an assault on one X; and [if the statute requires a battery to complete the offence] him the said X did then and there, with said deadly [*or*, dangerous, &c.] weapon, feloniously [2] beat, bruise, wound, and ill-treat [adding, if the statute further requires, the intent, and any other element essential to the punishment sought]; against the peace, &c.[3]

§ 213. **With Poison.** — The indictment should follow the statutory terms. If, for example, they make it felony for one to "unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison, . . . so as thereby to endanger the life of such person,"[4] the allegations may be, —

as of law, that it is "dangerous," "deadly," or the like. And see Crim. Proced. II. § 64.

[1] "Feloniously" to be inserted only in felony.

[2] See the last note.

[3] The variations demanded to meet the differing statutory expressions will be considerable, but the pleader can make them as well without further forms to guide him as with them. Let him lay his statute before him, and, having in mind the facts of the individual case, proceed as directed ante, § 31–36. If still he is in doubt, let him consult such of the forms below referred to as are accessible. Many of them are needlessly prolix, but this does not render them bad, or he can abridge them to his taste.

With Deadly Weapon. — The State *v.* Freeman, 21 Misso. 481; People *v.* War, 20 Cal. 117; The State *v.* McClintock, 1 Greene, Iowa, 392; The State *v.* Chandler, 24 Misso. 371; The State *v.* Finley, 6 Kan. 366; The State *v.* Bybee, 17 Kan. 462; The State *v.* Miller, 25 Kan. 699; Commonwealth *v.* Hawkins, 11 Bush, 603; Dollarhide *v.* United States, Morris, 233; People *v* Vierra, 52 Cal. 451; The State *v* Thompson, 41 Texas, 523; The State *v.* Killough, 32 Texas, 74; The State *v.* Walker, 40 Texas, 485; The State *v.* Nations, 31 Texas, 561; The State *v.* Davis, 26 Texas, 201; The State *v.* Sprinkle, 65 N. C. 463; People *v.* Davis, 4 Parker C. C. 61; The State *v.* Hays, 67 Misso. 692; The State *v.* Harper, 69 Misso. 425; The State *v.* Lawry, 4 Nev. 161; The State *v.* Davis, 29 Misso. 391, 395.

With Dangerous Weapon. — The State *v.* Goddard, 69 Maine, 181; The State *v.* Palmer, 35 Maine, 9; Commonwealth *v.* Peters, 12 Met. 387; Commonwealth *v.* Creed, 8 Gray, 387; Commonwealth *v.* McLaughlin, 12 Cush. 612; Commonwealth *v.* Sanborn, 14 Gray, 393; The State *v.* Dineen, 10 Minn. 407; Kilkelly *v.* The State, 43 Wis. 604; Commonwealth *v.* Gallagher, 6 Met. 565; The State *v.* Dalton, 27 Misso. 13; Nelson *v.* People, 5 Parker C. C. 39; Sullivan *v.* The State, 44 Wis. 595; Randall *v.* Commonwealth, 24 Grat. 644; United States *v.* Howard, 3 Sumner, 12; The State *v.* McDonald, 67 Misso. 13, 15.

With Gun — Shooting, &c. — The State *v.* Goddard, 69 Maine, 181; The State *v.* Newsom, 13 W. Va. 859; The State *v.* Greenhalgh, 24 Misso. 373; Shea *v.* Reg. 3 Cox C. C. 141; Reg. *v.* James, 1 Car. & K. 530; Reg. *v.* Lewis, 9 Car. & P. 523; Reg. *v.* Douglas, Car. & M. 193; The State *v.* O'Flaherty, 7 Nev. 153, 157; The State *v.* Munson, 76 Misso. 109, 110; 4 Went. Pl. 70; 3 Chit. Crim. Law, 788, 789, 791, 792, 794, 826.

With Whip. — Commonwealth *v.* Ford, 5 Gray, 475; Gorman *v.* The State, 42 Texas, 221.

With Walking Stick. — 3 Chit. Crim. Law, 823; 4 Went. Pl. 71.

With Plank. — The State *v.* Hartman, 41 Texas, 562.

With Drawn Sword. — 3 Chit. Crim. Law, 828.

With Bayonet. — 3 Chit. Crim. Law, 826.

With Offensive Weapon. — 3 Chit. Crim. Law, 809.

With Destructive Matter. — Reg. *v.* Crawford, 2 Car. & K. 129.

[4] 24 & 25 Vict. c. 100, § 23.

That A, &c. on, &c. at, &c. did unlawfully, maliciously, and feloniously administer to and cause to be taken[1] by one X [a large quantity, to wit[2]] two drachms[3] of a certain deadly poison called white arsenic [*and*, &c. alleging any other poison which by any probability may come within the proofs, ante, § 18–21[4]], and thereby did then and there feloniously endanger the life of the said X; against the peace, &c.[5]

§ 214. **Bodily Harm.** — The English statute of 24 & 25 Vict. c. 100, § 20, in terms similar to which are some American ones, makes it a punishable misdemeanor for a person to "unlawfully and maliciously . . . inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument." This offence includes an assault, but the word "assault" need not be employed in the allegation.[6] It suffices to say, —

That A, &c. on, &c. at, &c. did unlawfully and maliciously inflict grievous bodily harm upon one X; against the peace, &c.[7]

[1] "Administer to" covers in effect the entire statutory phrase "administer to or cause to be administered to." Crim. Proced. I. § 332; II. § 438, 647. Archbold's form has only this, and he recommends adding a count stating that the defendant "did cause to be taken by," &c. Archb. Crim. Pl. & Ev. 19th ed. 729. But the form as I have reconstructed it is equally good; and, if we assume that there is a difference between administering to and causing to be taken by, the proof of either will sustain the averment. Crim. Proced. I. § 586; Stat. Crimes, § 244. Multiplying counts in such a case is practically objectionable. Ante, § 18–21.

[2] Archbold has these words, but they are plainly useless.

[3] This exact specification of quantity accords with usual forms and is proper. Still it is doubtless not necessary. At all events, the proofs of quantity need not correspond to the allegation. Crim. Proced. I. § 488 *b*.

[4] Instead of this, Archbold says, "if the kind of poison, &c. be doubtful, add counts describing it in different ways." But to put all such matter into one count does not render it double, and for abundant reasons this is the better method. And see ante, § 138. I deem it practically best, and always safest in the absence of adjudication, to name the poison. As to the necessity of it, see Crim. Proced. II. § 64; Stat. Crimes, § 756, 757; ante, § 139, note.

[5] Archb. Crim. Pl. & Ev. 19th ed. 729. For administering poison with intent to kill, see the title Homicide. Consult, for various forms, some of which have the needless allegation (ante, § 207–209) that the defendant assaulted the injured person, 3 Chit. Crim. Law, 795; Reg. *v.* Heppingstall, 8 Cox C. C. 111; Reg. *v.* Dilworth, 2 Moody & R. 531; The State *v.* Clarissa, 11 Ala. 57; Reg. *v.* Button, 8 Car. & P. 660; Reg. *v.* Hansom, 4 Cox C. C. 138, 2 Car. & K. 912; Davis *v.* The State, 4 Texas Ap. 456, 458; Reg. *v.* Shannon, Jebb, 209; Commonwealth *v.* Galavan, 9 Allen, 271; Commonwealth *v.* Bearse, 108 Mass. 487; Sarah *v.* The State, 28 Missis. 267; La Beau *v.* People, 6 Parker C. C. 371.

[6] Reg. *v.* Canwell, 11 Cox C. C. 263; Reg. *v.* Taylor, Law Rep. 1 C. C. 194, 11 Cox C. C. 261.

[7] Reg. *v.* Canwell and Reg. *v.* Taylor, supra. For other forms for this offence and for assault with intent to inflict bodily injury, or grievous bodily harm, see Reg. *v.* Cruse, 2 Moody & R. 53; The State *v.* Dineen, 10 Minn. 407; The State *v.* Garvey, 11 Minn. 154, 161; Dawson *v.* People, 25 N. Y. 399; Henshall's Case, 2 Lewin, 135; Reg. *v.* St. George, 9 Car. & P. 483; Reg. *v.* Yeadon, 9 Cox C. C. 91; Reg. *v.* Bird, 5 Cox C. C. 11, 12; 6 Cox C. C. App. 26, 27; People *v.* War, 20 Cal. 117; People *v.* Casey, 72 N. Y. 393.

§ 215. **Felonious Assaulter.** — Under a statute providing, that, "if any person, not being armed with a dangerous weapon, shall assault another with force and violence, and with intent to rob or to steal, he shall be deemed a felonious assaulter, and shall be punished," &c., the allegations may be, —

That A, &c. on, &c. at, &c. not being then and there armed with a dangerous weapon, in and upon one X did feloniously and with force and violence make an assault, with the intent the moneys, goods, and chattels of the said X, from his person and against his will, then and there feloniously and by force and violence and by assault and putting in fear, to rob, steal, take, and carry away; against the peace, &c.[1]

§ 216. **Aggravated.** — The foregoing assaults and assaults and batteries, and others of like enormity, are sometimes designated by the short term "aggravated," — a word particularly applicable to the more complicated provisions[2] of this nature, —

§ 217. **Weapon, Intent, Excuse, &c.** — A statute in New York makes any one a felon "who, with intent to do bodily harm, and without justifiable or excusable cause, shall hereafter commit any assault upon the person of another with any knife, dirk, dagger or other sharp dangerous weapon." And the indictment may aver, —

That A, &c. on, &c. at, &c. did, wilfully and feloniously, with intent to do bodily harm to one X, and without justifiable and excusable cause,

[1] Commonwealth *v.* Sanborn, 14 Gray, 393. And see The State *v.* Bell, 27 Md. 675; Ruby *v.* The State, 7 Misso. 206; Carrico *v.* The State, 11 Misso. 579. Doubtless this form might be reduced to somewhat fewer words. It was adjudged, in this case of Commonwealth *v.* Sanborn, not necessary to aver the conclusion of law (Crim. Proced. I. § 515) that the defendant became or was decmed a felonious assaulter. And compare with the statute and form in the last section. A Kentucky statute made punishable any person who "shall wilfully and maliciously shoot at and wound another, with an intention to kill him, so that he does not die thereby, with a gun or other instrument loaded with a leaden bullet or other hard substance." And the averments were adjudged adequate, that the defendant, on, &c. at, &c. "with a certain pistol which he then and there had and held, feloniously and maliciously shot and wounded one X, then and there being, with the intent then and there to kill and murder the said X;" not saying that X "did not die thereby," or covering the statutory words "loaded with a leaden bullet or other hard substance." Burns *v.* Commonwealth, 3 Met. Ky. 13. There is no objection of principle to the former of these two omissions. The decision as to the latter was compelled by certain statutes rendering necessary less of allegation than the common-law rules require. By the common-law rules this matter should have appeared in averment. See also Dawson *v.* People, 25 N. Y. 399.

[2] For forms for the aggravated offence, see, for example, The State *v.* Richards, 33 La. An. 1294; The State *v.* Bean, 36 N. H. 122; Tucker *v.* The State, 6 Texas Ap. 251; Hunt *v.* The State, 9 Texas Ap. 404; Smith *v.* The State, 9 Texas Ap. 475; Meier *v.* The State, 10 Texas Ap. 39;

make an assault upon the person of said X, [and did then and there beat, bruise, wound, and ill-treat him[1]], with a certain knife, and with three other sharp and dangerous weapons known respectively as a sword, a bayonet, and a marline-spike,[2] which he the said A then and there had and held;[3] against the peace, &c.[4]

§ 218. **By Abandonment.** — To abandon a helpless person whom one's legal duty requires him to take care of, or to carry such person to and leave him at a place, where physical injury may probably befall him, is, on principle, an assault, and, if injury ensues, a battery also; though the books do not always speak of the offence by this name, or all of them sanction the branch of this proposition which relates to assault.[5] It is believed that the following form will — or, at least, should — be deemed good at the common law both for the assault and for the battery, —

That A, &c. on, &c. at, &c. did make an assault on a certain helpless infant child, of the tender age of four days, and not named [*or*, the name whereof is to the jurors unknown], by then and there taking and laying said child, at night, while it was dark, on the sidewalk of a certain street there, whereon many people were walking and passing, and leaving and abandoning said child there to the imminent danger of being trodden upon and maimed and killed, and that afterward, then and there, persons so walking did tread upon said child, whereby the said A did beat, bruise, wound, and ill-treat the said child; against the peace, &c.[6]

§ 219. **Under a Statute** — making it a punishable misdemeanor to "unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured,"[7] the allegations may be, —

Browning *v.* The State, 2 Texas Ap. 47, 49; Coney *v.* The State, 2 Texas Ap. 62; Wilks *v.* The State, 3 Texas Ap. 34.

[1] Possibly the question might arise, whether the statutory words "upon the person" do not imply that there shall be a battery. If there must be, it may be prudent to insert what I have here put in brackets.

[2] This form is practically better than the insertion of a count for each weapon. See ante, § 17–21, 212, 213 and note.

[3] "Which he," &c. is a practically judicious averment; but it is probably not necessary. And see Crim. Proced. II. § 514, 515. And compare with ante, § 212.

[4] People *v.* Casey, 72 N. Y. 393.

[5] Crim. Law, I. § 557, 883, 884; II. § 29; Commonwealth *v.* Stoddard, 9 Allen, 280; Reg. *v.* Renshaw, 2 Cox C. C. 285; Rex *v.* Ridley, 2 Camp. 650, 653; Reg. *v.* Waters, 1 Den. C. C. 356, 360.

[6] For forms, see Shannon *v.* People, 5 Mich. 71; Commonwealth *v.* Stoddard, supra; Reg. *v.* Hogan, 2 Den. C. C. 277, 5 Cox C. C. 255; Reg. *v.* Phillpot, Dears. 179; s. c. nom. Reg. *v.* Philpott, 6 Cox C. C. 140; Reg. *v.* Cooper, 1 Den. C. C. 459, 3 Cox C. C. 559; Reg. *v.* Pelham, 8 Q. B. 959, 2 Cox C. C. 17; Reg. *v.* Smith, 14 Cox C. C. 398.

[7] 24 & 25 Vict. c. 100, § 27.

That A, &c. on, &c. at, &c. did unlawfully abandon[1] [one X[2]], who was then and there a child under the age of two years, whereby the life of the said child was endangered; against the peace, &c.[3]

§ 220. **By Abusing Right of Chastisement.** — This form of the offence may be prosecuted by an ordinary indictment for assault and battery, leaving the defendant to rely on the right in defence at the trial.[4] Still it will sometimes be convenient to introduce averments indicative of the relationship of the parties; as, for example, —

That A, &c. on, &c. at, &c. in and upon one X did make an assault, and her the said X, with a ferule which he then and there had and held,[5] did then and there beat, wound, and strike divers grievous and dangerous blows on her head, back, shoulders, and other parts of her body; against the peace, &c.[6]

§ 221. **On Two or More.** — Where the one unlawful impulse takes effect on two or more persons, their names may be joined in one allegation of the injury.[7] Thus, —

That A, &c. on, &c. at, &c. did make an assault in and upon X and Y, and them the said X and Y did then and there beat, bruise, wound, and ill-treat; against the peace, &c.[8]

§ 222. **By Two on Each Other.** — In those cases in which a fighting together by two or more persons is prosecuted on one indictment as assault and battery,[9] instead of on several indictments,[10] or as affray[11] or prize-fight,[12] the allegations may be, —

[1] Perhaps some courts would hold that the particulars of the abandonment should be given. For matter helpful on this question, see Stat. Crimes, § 1115–1119, and the places there referred to.

[2] Not in the form before me. I think some judges would hold this averment of the name not to be necessary. But to give it better accords with the rules of good pleading. Crim. Proced. I. § 571; II. § 62.

[3] Reg. *v.* Falkingham, Law Rep. 1 C. C. 222, 11 Cox C. C. 475.

[4] Archb. Crim. Pl. & Ev. 19th ed. 718. And see Crim. Proced. II. § 70.

[5] Ante, § 217 and note.

[6] Commonwealth *v.* Randall, 4 Gray, 36. For other forms, see United States *v.* Harriman, 1 Hughes, 525; 3 Chit. Crim. Law, 829; 4 Went. Pl. 60; 6 Cox C. C. App. 41.

[7] Crim. Proced. II § 60.

[8] Commonwealth *v.* O'Brien, 107 Mass. 208.

[9] Crim. Proced. II. § 61.

[10] Commonwealth *v.* Collberg, 119 Mass. 350.

[11] Crim. Law, II. § 1; Crim. Proced II. § 16 et seq; The State *v.* Brewer, 33 Ark. 176; The State *v.* Priddy, 4 Humph. 429; The State *v.* Billingsley, 43 Texas, 93; Curlin *v.* The State, 4 Yerg. 143.

[12] Crim. Law, I. § 260, note, 535, 632; II. § 35; Crim. Proced. II. § 24, 61.

That A, &c. and B, &c. on, &c. at, &c. did make an assault each on the other, and each did then and there beat, bruise, wound, and ill-treat the other; against the peace, &c.[1]

§ 223. **Other Aggravations** — sometimes appear; but the setting of them out requires no skill not taught in the foregoing explanations.[2]

§ 224. **Attempts.**[3] — Should we deem, that, because a simple assault is a species of attempt, there can be no indictable attempt at the common law to commit it,[4] still we have statutory and even common-law attempts, other than assault, to perpetrate aggravated and perhaps simple batteries. Thus, —

§ 225. **Solicitation to Battery.** — It seems to be good to aver, —

That A, &c. on, &c. at, &c. devising and intending to cause and procure one X to be maliciously and unlawfully assaulted and beaten, did [then and there[5]] solicit, persuade, incite, and endeavor to procure one Y thus to assault and beat the said X; against the peace, &c.[6]

§ 226. **Assault with Ulterior Intent.** — The forms for assaults, administering poison, and the like, with intent to commit particular offences, are given under the titles of the offences themselves.[7]

[1] The State *v.* Lonon, 19 Ark. 577.

[2] Some forms in the books are the following: Against a medical man for needlessly causing a female patient to strip naked before him. Rex *v.* Rosinski, 1 Moody, 19, 1 Lewin, 11. For touching one to extort a confession of theft. The State *v.* Hobbs, 2 Tyler, 380. For stabbing and cutting. Rex *v.* Colepeppar, Trem. P. C. 190. For cutting and wounding. Reg. *v.* Elrington, 1 B. & S. 688. For assault with a dangerous weapon on board a ship of the United States in a foreign port. United States *v.* Howard, 3 Sumner, 12. In public way, &c. 3 Chit. Crim. Law, 833; Rex *v.* Williams, 1 Leach, 4th ed. 529. In a dwelling-house, with attempted larceny. Rex *v.* Phipoe, 2 Leach, 4th ed. 673. And see 2 Chit. Crim. Law, 504. On woman quick with child. 3 Chit. Crim. Law, 831. On clergyman. 3 Chit. Crim. Law, 827. On speaker of House of Commons in his place. Rex *v.* Holles, Trem. P. C. 294. Tearing out hair. 3 Chit. Crim. Law, 822. Beating out an eye. 3 Chit. Crim. Law, 822. In connection with opprobrious language. 3 Chit. Crim. Law, 862. And taking away receipt. 3 Chit. Crim. Law, 827; 6 Went. Pl. 435. On account of money won at play. 3 Chit. Crim. Law, 833.

[3] Ante, § 100–112. And see Rex *v.* Butler, 6 Car. & P. 368.

[4] Crim. Law, II. § 62.

[5] Ante, § 106 and note.

[6] The form in United States *v.* Lyles, 4 Cranch C. C. 469, is before me; but, besides containing surplusage, it is otherwise not drawn with sufficient neatness to be properly preserved for use. And see ante, § 106; and forms in Rex *v.* Butler, 6 Car. & P. 368; Rex *v.* Goodman, 13 Howell St. Tr. 359; Rex *v.* Devonshire, Trem. P. C. 188.

[7] And see the forms in Commonwealth *v.* Bearse, 108 Mass. 487, and Commonwealth *v.* Galavan, 9 Allen, 271, for mingling poison with intent; Reg. *v.* Shannon, Jebb, 209, and The State *v.* Clarissa, 11 Ala. 57, for attempt to poison; and Reg. *v.* James, 1 Car. & K. 530, Reg. *v.* Lewis, 9 Car. & P. 523, White *v.* The State, 13 Ohio State, 569, for shooting and attempting to shoot with intent.

III. *Practical Suggestions.*

§ 227. **Surplusage.** — The allegations for these offences may, the reader perceives, be short. Hence pleaders are tempted, in order to make a good showing for their work, to crowd the indictment with surplusage. They should bear in mind that such matter, while oppressive to the innocent, and never serving any good purpose, not unfrequently increases the chances of escape to the guilty.

§ 228. **Numerous Counts.** — The suggestions already given[1] for avoiding numerous counts, by charging in one count the different consistent methods of committing the one offence meant, are oftener applicable in assault and battery than in most other crimes. If, for example, the statute enumerates several weapons, the use of any one of which enhances the guilt, and it is uncertain what one of them will be proved to have been employed in the particular instance, no good can come, but evil may, from specifying a single weapon in a count, and covering all by adding count to count. Thus, it is better to charge in one count, that the assault or the battery was committed with a pair of tongs, a hammer, and an axe-handle;[2] or, with a pistol, and with a large wooden stick, and with a fence-rail, and with a wooden board, being severally deadly weapons;[3] than to have a count for each weapon, and perhaps compel the jury to select the count on which to found their verdict, and entangle the record.

§ 229. **For Defendant.** — In complicated cases, the defendant's counsel has a wide field over which to look and watch for defects in the inculpating proofs. If, for illustration, the indictment is for assault with a particular intent, he will hold the prosecuting power strictly to its duty of satisfying the jury that the defendant's purpose was, in fact, the one charged.[4] But it is needless to attempt here to specify all.

[1] Ante, § 19–21. And see Crim. Proced. II. § 65, 656.

[2] The State *v.* McDonald, 67 Misso. 13.

[3] The State *v.* McClintock, 1 Greene, Iowa, 392.

[4] Crim. Law, I. § 729–736; Crim. Proced. I. § 1101, 1126, 1184.

For ATTEMPT, see ante, § 100–112.

CHAPTER XV.

BANKRUPTCY AND INSOLVENCY, OFFENCES CONNECTED WITH.[1]

§ 230. **What for this Chapter.** — The bankruptcy and insolvency provisions being various and changing, it is deemed not best to enter minutely into them here. No forms need be given. But, for the convenience of practitioners, some references will be made to places where forms may be found for offences under the English and repealed American statutes.

§ 231. **Omitting from Schedule.** — The insolvent wilfully omitting money or effects from his schedule, and the like.[2]

§ 232. **Not Disclosing.** — The bankrupt otherwise concealing or not duly disclosing his effects.[3]

§ 233. **Act of Bankruptcy** — of various sorts.[4]

§ 234. **Wrongful Purchases and Sales** — by bankrupt before bankruptcy.[5]

§ 235. **Not Surrendering himself,** — to be examined, &c.[6]

§ 236. **Examination on Oath.** — The bankrupt refusing to be examined on oath, or to answer questions, or answering them wrongly.[7]

[1] See Crim. Law, I. § 298, 572 *a*, note; Crim. Proced. I. § 53, 1304; Stat. Crimes, § 29, 103, 129, 183, 823

[2] Reg. *v.* Marner, Car. & M. 628. And see United States *v.* Block, 15 Bankr. Reg. 325, 4 Saw. 211; United States *v.* Clark, 4 Bankr. Reg. 59.

[3] 2 Chit. Crim. Law, 509, 523; 6 Cox C. C. App. 90, 111, 128, 133; Ratcliffe's Case, 2 Lewin, 57; Reg. *v.* Manser, 4 Fost. & F. 45; Rex *v.* Forsyth, Russ. & Ry. 274; Nash *v.* Reg. 4 B. & S. 935, 9 Cox C. C. 424, 425; Reg. *v.* Michell, 14 Cox C. C. 490; Respublica *v* Tryer, 3 Yeates, 451; Reg. *v.* Harris, 4 Cox C. C. 140. And see United States *v.* Crane, 3 Clif. 211; Rex *v.* Forsyth, Russ. & Ry. 274.

[4] Reg. *v.* Hillam, 12 Cox C. C. 174, 2 Eng. Rep. 227; Reg. *v.* Raudnitz, 4 Fost. & F. 165; Reg. *v.* Hilton, 2 Cox C. C. 318; Reg. *v.* Swan, 4 Cox C. C. 108.

[5] Reg. *v.* Knight, 14 Cox C. C. 31; Reg. *v.* Watkinson, 12 Cox C. C. 271, 4 Eng. Rep. 547; Reg. *v.* Oliver, 13 Cox C. C. 588; Reg. *v.* Hilton, 2 Cox C. C. 318; Reg. *v.* Harris, 4 Cox C. C. 140; Reg *v.* Thomas, 11 Cox C. C. 535; United States *v.* Prescott, 2 Abb. U. S. 169, 2 Bis. 325. And see United States *v.* Pusey, 6 Bankr. Reg. 284.

[6] 6 Cox C. C. App. 110; Reg. *v.* Kenrick, 1 Cox C. C. 146; Reg. *v.* Buckwell, 9 Cox C. C. 333; Reg. *v.* Hill, 1 Car. & K. 168; Reg. *v.* Hughes, 1 Fost. & F. 726.

[7] 7 Cox C. C. App. 35; Rex *v.* Hynde, Trem. P. C. 239; Rex *v.* Page, Russ. & Ry. 392, 1 Brod. & B. 308.

§ 237. **Altering Books.** — The bankrupt altering or mutilating his books of account.[1]

§ 238. **Concealing Books.** — The bankrupt concealing his books of account.[2]

§ 239. **Fraudulent Insolvency** — under the Pennsylvania statute.[3]

[1] Reg. *v.* Scott, Dears. & B. 47, 1 Cox C. C. 164; Reg. *v.* Braun, 9 Cox C. C. 284; Reg. *v.* Leatherbarrow, 10 Cox C. C. 637.

[2] Rex *v.* Walters, 5 Car. & P. 138, 139, note.

[3] Dyott *v.* Commonwealth, 5 Whart. 67, 69.

For BARRATRY, see NUISANCE.
BASTARDY, see ante, § 159.
BATTERY, see ASSAULT AND BATTERY.
BAWDY-HOUSE, see NUISANCE.
BEGGING, see VAGRANCY.
BESTIALITY, see SODOMY.
BETTING ON ELECTIONS, see ELECTION OFFENCES.
BIGAMY, see POLYGAMY.
BLACKMAIL, see THREATENING LETTERS, &c.

CHAPTER XVI.

BLASPHEMY AND PROFANENESS.[1]

§ 240. **Surplusage.** — The precedents of indictment for these nearly identical offences are so crowded with surplusage, and the decisions on them are so few, that it is not quite plain to how narrow proportions the allegations may be safely and judiciously reduced. Yet certainly they may be reasonably short.

§ 241. **Blasphemy at Common Law.** — Chitty's common-law form for oral blasphemy is: —

That A, &c. [not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil,[2] and contriving and intending to scandalize and vilify the true and Christian religion as received and publicly professed within this realm of England, and to blaspheme God and our Lord Jesus Christ the Saviour of the world[3]], on, &c. at, &c. having and holding in his hands a certain cup of wine, unlawfully, wickedly, and blasphemously, in the presence and hearing of divers liege subjects of our said Lord the King, spoke, pronounced, and with a loud voice published these profane and blasphemous words following, that is to say, "Here 's a health to Father, Son, and Holy Ghost" (meaning Almighty God, Jesus Christ the Saviour of the world, and the Holy Spirit), and immediately thereupon then and there drank the wine from said cup; [to the great dishonor of Almighty God, in contempt and disgrace of the Holy Trinity, to

[1] For direct expositions of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 73–84; Crim. Proced. II. § 123–125. Incidental, Crim. Law, I. § 498; II. § 946; Crim. Proced. I. § 557.

[2] The matter in these brackets so far is certainly unnecessary. Ante, § 44.

[3] Speaking without specific judicial determinations before me, I should say that the rest of this matter in brackets is manifestly needless, and better omitted. If one from foul-mouthed recklessness utters the blasphemous words, plainly he commits the offence, though he has not the specific intent here charged. And it is always practically best not to aver what need not in fact exist; otherwise the jury, hearing the indictment read, and not finding the fact, may refuse to convict. Something like this matter appears in the form in The State *v.* Chandler, 2 Harring. Del. 553; and, almost as of course, in such forms as in Rex *v.* Doyley, Trem. P. C. 225, and Rex *v.* Taylor, Trem. P. C. 226. But it is not in the form in People *v.* Ruggles, 8 Johns. 290; or The State *v.* Moser, 33 Ark. 140; or Commonwealth *v.* Kneeland, 20 Pick. 206.

the great scandal of the profession of the Christian religion, to the evil example of all others in the like case offending,[1]] and against the peace, &c.[2]

§ 242. **Analogies.** — The indictment will follow the analogies in "Libel and Slander," the forms under which head will be serviceable here.[3] And for some varieties of the offence, particularly of profaneness, and even of blasphemy, the analogies from "Nuisance" may be helpful;[4] while yet the conclusion "to the common nuisance," &c.[5] is not in use or probably necessary.

§ 243. **General Formulas.** — The following formulas, which, when the indictment is on a statute, may be varied with the statutory terms, will be helpful, —

Oral. — That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80] did, maliciously and blasphemously [*or* profanely], in the presence and hearing of divers people there assembled, pronounce, publish, and proclaim the following blasphemous [*or* profane] words; that is to say [setting out the words according to their tenor; and, when their meaning is not plain, adding explanations, as see the title "Libel and Slander"]; against the peace, &c. [ante, § 66–69].

Written. — That A, &c. on, &c. at, &c. did maliciously, blasphemously, and profanely write, print, and publish a certain malicious, blasphemous, scandalous, and profane libel, of and concerning God the Creator and Ruler of the world, and of and concerning the Holy Scriptures, and of and concerning the Christian religion [inserting a part or all of these expressions according to the fact], in one part whereof are the following words,[6] to wit [here setting out the words, with any innuendoes which may be required to make their meaning plain]; and in another part whereof are the following words, to wit [setting them out, with innuendoes when necessary, as before]; against the peace, &c.[7]

[1] No part of the matter in these brackets is necessary. Ante, § 48.

[2] 2 Chit. Crim. Law, 13. The form is similar in The State *v.* Chandler, supra.

[3] Crim. Proced. II. § 123.

[4] Crim. Law, II. § 79; Reg. *v.* Bradlaugh, 15 Cox C. C. 217, 230.

[5] Crim. Proced. II. § 862–864.

[6] For various forms of averring, as here, the tenor, see Crim. Proced. I. § 559.

[7] For other forms, see 2 Chit. Crim. Law, 13–20; Rex *v.* Doyley, Trem. P. C. 225; Rex *v.* Taylor, Trem. P. C. 226; Rex *v.* Williams, 26 Howell St. Tr. 653; Reg. *v.* Ramsey, 1 Cab. & E. 126; Reg. *v.* Bradlaugh, 15 Cox C. C. 217. And see Rex *v.* Eaton, 31 Howell St. Tr. 927.

Arkansas. — The State *v.* Moser, 33 Ark. 140.

Delaware. — The State *v.* Chandler, 2 Harring. Del. 553.

Massachusetts. — Commonwealth *v.* Kneeland, 20 Pick. 206.

New York. — People *v.* Ruggles, 8 Johns. 290.

North Carolina. — The State *v.* Jones, 9 Ire. 38; The State *v.* Chrisp, 85 N. C. 528.

Pennsylvania. — Updegraph *v.* Commonwealth, 11 S. & R. 394.

Tennessee. — The State *v.* Graham, 3 Sneed, 134; Young *v.* The State, 10 Lea, 165.

§ 244. **On Statute.** — The statutes creating these offences differ in terms. Under one rendering it punishable for any person to "make use of any *profane*, violent, abusive, or insulting language toward or about another person in his presence or hearing, which language in its common application is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault," the allegations may be, —

That A, &c. on, &c. at, &c. unlawfully and violently did make use of profane and abusive language toward and about and in the presence and hearing of one X then and there being, by then and there saying to the said X, "Go to hell, God damn you;" which said language was then and there calculated to rouse the said X to anger, and to cause then and there a breach of the peace; against the peace, &c.[1]

[1] The State *v.* Moser, 33 Ark. 140.

For BRANDING CATTLE, ILLEGAL, see ante, § 165.
BREACH OF PRISON, see PRISON BREACH, &c.
BREAKING HOUSE, see BURGLARY, &c.

CHAPTER XVII.

BRIBERY.[1]

§ 245. **Attempt and Substantive Offence.** — An unaccepted offer of money as a bribe — in its nature, a mere attempt — is so often mentioned in our books under the substantive name of bribery,[2] that the distinction will not be regarded in the arrangement of this chapter.

§ 246. **Common-law Indictment — (Offering Bribe to Constable).** — It is a leading form, from an early period and still prominent in the English books, while yet it is needlessly prolix, to say, —

That heretofore, to wit, on, &c. at, &c. one M, esquire, then and yet being one of the justices of our said Lady the Queen, assigned to keep the peace for our said Lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to all constables and other peace officers of the said county, and especially to X, thereby commanding them upon sight thereof to take and bring before him the said M, so being such justice as aforesaid, or some other of her Majesty's justices of the peace for the said county, the body of Y, late of the parish aforesaid in the county aforesaid, to answer [&c. as in the warrant]; and which said warrant afterwards, to wit, on the day and year aforesaid, at the parish aforesaid in the county aforesaid, was delivered to the said X, then being one of the constables of the same parish, to be executed in due form of law. And [the jurors aforesaid upon their oath aforesaid do further present[3]], that A, &c. [the defendant], well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice, and to prevent the said Y from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid in the county afore-

[1] For direct elucidations of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 85–89; Crim. Proced. II. § 126, 127. Incidental, Crim. Law, I. § 246, 468, 471, 767, 974, 975; Crim. Proced. I. § 61, 1251; II. § 75; Stat. Crimes, § 803, 818, 843.

[2] Crim. Law, II. § 88; Crim. Proced. II. § 126.

[3] Unnecessary. Ante, § 64, 115, note.

said, unlawfully, wickedly, and corruptly did offer unto the said X, so being constable as aforesaid, and having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of ten pounds, if he the said X would refrain from executing the said warrant, and from taking and arresting the said Y under and by virtue of the same, for and during fourteen days from that time, that is to say, from the time he the said A so offered the said sum of ten pounds to the said X as aforesaid: and so the jurors aforesaid upon their oath aforesaid do say, that the said A, on the said —— day of ——, in the year aforesaid, at the parish aforesaid in the county aforesaid, in manner and form aforesaid, did attempt and endeavor to bribe the said X, so being constable as aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said Y under and by virtue of the warrant aforesaid: in contempt of our Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her crown, and dignity.[1]

§ 247. **General Formula.** — Subject to be varied by the statute, or by views special to the particular pleader or court, we may set down the following as a good general formula for the indictment: —

That on, &c. at, &c. [stating briefly, as see note to the last section, the judicial, governmental, or other proceeding or occasion by reason of which the act complained of becomes indictable]. Whereupon A, &c. [the defendant, ante, § 74–77], then and there [*or*, afterward, on, &c. at, &c. ante, § 80, according to the nature of the case], did, well knowing the premises, corruptly and maliciously[2] tender and offer to X [*or* to said X, proceeding to show his connection with the case if it has not already been explained;

[1] Archb. Crim. Pl. & Ev. 10th Lond. ed. 686, 19th ed. 890; 3 Chit. Crim. Law, 696; 6 Cox C. C. App. 114. **As to which Form.** — The question of setting out the warrant of arrest, and the foundation for it, appears to me to be within principles discussed ante, § 91–97. Reasoning from the views there presented, from the general rules of criminal pleading, and from what I have observed of the American practice, I should deem it sufficient, under the common law of our States, to say, —

That on, &c, at, &c. M, esquire, being then one of the justices of the peace within and for said county, did, acting in his said office, in a cause within his jurisdiction, duly issue his official warrant, directed to one X, who was then and there a constable in and for said county [*or*, city, &c. according as the fact may be], or to any other such constable, and did then and there deliver the same to the said X, commanding them, for a cause therein duly appearing, whereof the said M had then and there jurisdiction, to bring forthwith before him the said M, or any other justice of the peace within and for said county, the body of one Y [not following the terms of the warrant, which differ somewhat in our States]. Whereupon A, &c. [the defendant], did afterward, on, &c. at, &c. well knowing the premises, and devising to defeat the ends of justice, and to enable the said Y to escape, corruptly and maliciously offer and tender to the said X, as and by way of a bribe, five dollars if he the said X would, for the space of fourteen days then next following, forbear to execute the said warrant, and abstain from taking by virtue of it the said X into custody; against the peace, &c.

[2] Where the offence is felony, add "feloniously."

or, pay to said X, &c.; *or*, accept and receive of and from the said X, &c.] as and by way of a bribe, the sum of, &c. [*or*, mentioning any other valuable thing which will appear in evidence], to, &c. [setting out the purpose, &c. of the bribe]; against the peace, &c. [ante, § 66–69].[1]

§ 248. **Election Bribery.** — A common sort of bribery occurs in connection with elections. Some of the English precedents of the indictment or information for it are very voluminous,[2] but no great expansion of the allegations is necessary.[3] Thus, it is adequate under the common law to say, —

That on, &c. a meeting of the inhabitants qualified to vote, of ward one in R in the county of K, for the election of one alderman and three common councilmen, was in said ward duly had and held,[4] and thereat one X was then and there a qualified voter. Whereupon A, &c. [the defendant], then and there wilfully and maliciously endeavoring to influence corruptly the said X concerning his said right of voting at said election, did then and there offer and pay to the said X the sum of two dollars in money[5] and current bank bills, as and for a bribe, to cast thereat his vote [this appears to be sufficient, but if the proposition of the defendant was that X should vote in a particular way, or for a candidate named, the pleader will in prudence and perhaps of necessity add this specification]; against the peace, &c.[6]

[1] For forms, see 3 Chit. Crim. Law, 682–698; 4 Went. Pl. 445; Rex *v.* Smith, 20 Howell St. Tr. 1225, 1227; Reg. *v.* Barfoot, 13 East, 506; Rex *v.* Stevens, 5 East, 244; Reg. *v.* Charretie, 13 Q. B. 447; Reg. *v.* Boyes, 1 B. & S. 311, 312; Reg. *v.* Leatham, 8 Cox C. C. 425; Reg. *v.* Mercer, 17 U. C. Q. B. 602.

Alabama. — Diggs *v.* The State, 49 Ala. 311; Cummins *v.* The State, 58 Ala. 387.

Arkansas. — Watson *v.* The State, 29 Ark. 299.

Florida. — The State *v.* Pearce, 14 Fla. 153.

Indiana. — The State *v.* Henning, 33 Ind. 189; The State *v.* Walls, 54 Ind. 561, 562.

Kentucky. — Commonwealth *v.* Stephenson, 3 Met. Ky. 226.

Maine. — The State *v.* Jackson, 73 Maine, 91.

South Carolina. — The State *v.* Smalls, 11 S. C. 262.

Texas. — Brown *v.* The State, 13 Texas Ap. 358.

West Virginia. — The State *v.* Lusk, 16 W. Va. 767.

United States. — United States *v.* Worrall, 2 Dall. 384, Whart. St. Tr. 189; United States *v.* Hendric, 2 Saw. 476, 479; United States *v.* Johnson, 2 Saw. 482.

[2] As in Rex *v.* Smith, 20 Howell St. Tr. 1225, 1227.

[3] See ante, § 246, note.

[4] Stat. Crimes, § 832–834.

[5] It may be dangerous to use simply the word "money" unless the proof will show the payment to have been in coin. Stat. Crimes, § 346.

[6] The State *v.* Jackson, 73 Maine, 91. In Commonwealth *v.* Stephenson, 3 Met. Ky. 226, the allegations, which were adjudged sufficient, were briefer; namely, —

That A, &c. on, &c. at, &c. bribed X to vote, at the August election [*query*, whether the place of the election should not be added. Stat. Crimes, § 834] in the year eighteen hundred and fifty, with money and property of the value of five dollars, and for said bribe he did vote, for M for governor of Kentucky, for N for lieutenant-governor of Kentucky, for O for auditor of Kentucky, and for P for congress; against the peace, &c.

§ 249. **Same on Statute.** — Under a statute making it punishable "if, at any election for representative . . . in the Congress of the United States, any person shall . . . aid, counsel, procure, or advise any person . . . to vote without having a lawful right to vote,"[1] the allegations may be, —

That, at an election for a representative in the Congress of the United States held on, &c. at, &c.[2] A, &c. did then and there unlawfully and corruptly counsel and advise one X, who, as the said A well knew, had not attained the age of twenty-one years, by reason whereof he the said X had no lawful right to vote, to nevertheless vote, and did then and there unlawfully and corruptly offer and tender to the said X the sum of, &c. as and for a bribe, if he would at said election vote for a representative in the Congress of the United States; against the peace, &c.[3]

§ 250. **Bribery of Arbitrator.** — Under a statute making punishable one "who offers or promises to give any money[4] to an arbitrator with intent to bias his opinion or influence his decision in relation to any matter in which he is acting or is to act," the allegations may be, —

That on, &c. at, &c. a certain cause in which A, &c. [as in ante, § 74–77] was plaintiff and one M was defendant, was pending and undetermined in the Court of, &c. [saying what court], and that at the January term thereof, on, &c. by agreement of the said parties the matters in controversy in said cause were in due form of law submitted to the arbitration and award of X and Y; and that afterward, while the said matters in controversy were before said arbitrators undetermined, and they were about to act and were acting thereon, the said A, on, &c. at, &c. with intent to bias the opinion and influence the decision of the said X therein, did unlawfully and corruptly offer and promise to give him five dollars in money,[5] as and for a bribe and inducement to act in said arbitration corruptly and contrary to his duty, and to decide the said controversy in favor of the said A; against the peace, &c.[6]

[1] Act of May 31, 1870, 18 U. S. Stats. at Large, 144, incorporated in substance into R. S. of U. S. § 5511.

[2] Stat. Crimes, § 832, 833.

[3] United States *v.* Hendric, 2 Saw. 476, 479. For giving money to a voter to repeat his vote, United States *v.* Johnson, 2 Saw. 482. Against a candidate for advancing money to be used in bribery, Reg. *v.* Leatham, 8 Cox C. C. 425. For giving money to a voter to vote for a particular candidate, Reg. *v.* Boyes, 1 B. & S. 311.

[4] Limiting the bribe to "money" — Stat. Crimes, § 346; ante, § 248, note — is not wise in legislation.

[5] In the form before me, the pleader says here, "a certain sum of money, to wit, the sum of five dollars." But such circumlocution is needless. Under the simpler expression in the text, the proof need not be of exactly five dollars, but any larger or smaller sum will equally suffice. Crim. Proced. I. § 488 *b*, 579.

[6] The State *v.* Lusk, 16 W. Va. 767.

CHAPTER XVIII.

BURGLARY AND OTHER BREAKINGS.[1]

§ 251. **How Chapter divided.** — We shall consider, I. The Indictment for the Substantive Offence; II. The Indictment for the Attempt.

I. *The Indictment for the Substantive Offence.*

§ 252. **Joining Felony meant with Burglary.** — Burglary is the felonious breaking and entering of another's dwelling-house, or of some other building of another specified by statute, in the night, with the intent to commit a felony in such building.[2] And it is widely practised, though not universal, to join, in the same count with the allegations for a burglary as thus defined, those also for the ulterior felony meant as actually perpetrated.[3]

§ 253. **Common-law Burglary and Larceny.** — A familiar common-law form for burglary, with larceny joined in the same count, is —

That A, &c. on, &c. about the hour of eleven in the night of the same day [with force and arms[4]], at, &c. the dwelling-house of one X [there situate[5]] feloniously and burglariously did break and enter, with intent the

[1] For the direct expositions of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 90–120; Crim. Proced. II. § 128–153. The breaking and entering, and the terms denoting the time and place, explained, Stat. Crimes, § 276–299, 312, 313. Collateral, Crim. Law, I. § 207, 262, 342, 437, 559, 577, 676, 736, 757, 1062–1064; Crim. Proced. I. § 83, 423, 439, 449, 488 *a*, 521, note, 573; II. § 747; Stat. Crimes, § 207, 221, 233, 240.

[2] Crim. Law, II. § 90, 118; Crim. Proced. II. § 130, 136.

[3] Crim. Proced. I. § 439, 449; II. § 129, 143.

[4] Not necessary. Ante, § 43.

[5] Perhaps necessary in England and some of our States. It was not, for example, in the indictment against Turner,

goods and chattels [of one Y[1]], in the said dwelling-house then and there being, then and there[2] feloniously and burglariously[3] to steal, take, and carry away; and then and there in the said dwelling-house, one silver sugar-basin of the value of three dollars, six silver table-spoons of the value of three dollars, and twelve silver teaspoons of the value of two dollars, of the goods and chattels of the said Y, in the said dwelling-house then and there being found, then and there feloniously and burglariously did steal, take, and carry away; against the peace, &c.[4]

§ 254. **Formula.** — The terms of our statutes, which must be covered by the indictment upon them, differ. But the following formula, to be varied when necessary to conform to statutory terms, will suffice for most cases: —

That A, &c. [ante, § 74–77] on, &c. [ante, § 80], about the hour of, &c. [ante, § 87], at, &c. [ante, § 80], did feloniously and burglariously break and enter the dwelling-house [*or* shop, *or* store, *or*, &c. employing the same word as the statute, unless one of narrower meaning is required for particularization[5]] of one X [there situate[6]], with intent the goods and chattels [of the said X; *or*, of one Y[7]] then being in said dwelling-house [*or*, &c. as before] then and there[8] feloniously and burglariously[9] to steal,

who was convicted and hung. Rex *v.* Turner, 6 Howell St. Tr. 565. The same in Reg. *v.* Parsons, Law Rep. 1 C. C. 24, note. In other States, and everywhere on principle, not necessary. Crim. Proced. II. § 135; Summers *v.* The State, 9 Texas Ap. 396; ante, § 179 and note.

[1] By some opinions, perhaps by all, this allegation of ownership is not necessary. Crim. Proced. II. § 142. In Reg. *v.* Lawes, 1 Car. & K. 62, it was held to be good and sufficient to say, "with intent the goods and chattels, in the said dwelling-house then and there being, then and there feloniously to steal, take, and carry away," not naming the owner. And the same was adjudged in The State *v.* Clark, 42 Vt. 629. In Massachusetts it is adequate to say "with intent to commit the crime of larceny." Tully *v.* Commonwealth, 4 Met. 357; Commonwealth *v.* Glover, 111 Mass. 395; Commonwealth *v.* Moore, 130 Mass. 45, 46; Commonwealth *v.* Darling, 129 Mass. 112. But the words "with the unlawful and felonious intent of then and there to commit the crime of rape upon the person of her the said Rachel Pullin," were adjudged insufficient in The State *v.* Williams, 41 Texas, 98. Various other courts appear to accept this doctrine; and it is probably nowhere adequate to say "with the intent then and there to commit the crime of felony." Crim. Proced. II. § 142; People *v.* Nelson, 58 Cal. 104.

[2] As to this "then and there," see post, § 254, note.

[3] See post, § 254, note.

[4] Archb. Crim. Pl. & Ev. 10th Lond. ed 297; Matthews Crim. Law, 434; 3 Chit. Crim. Law, 1117.

[5] Crim. Proced. I. § 568; II. § 135, 136; Stat. Crimes, § 440.

[6] See note to ante, § 253; also, ante, § 179 and note.

[7] See ante, § 253 and note.

[8] It is customary, and it seems to me quite proper, to insert the words "then and there" to the intent; but they have been held, and it would seem correctly, not to be necessary. Commonwealth *v.* Doherty, 10 Cush. 52.

[9] "Burglariously" is commonly connected with "feloniously" in this place in the indictment, the same as in the place preceding. But I do not see its necessity here. And indictments have been held good which did not contain it in this place; as, for example, Bradley *v.* The State, 32 Ark. 704; Carlton *v.* Commonwealth, 5 Met. 532; Josslyn *v.* Commonwealth, 6

take, and carry away [*or*, with intent then in said dwelling-house feloniously and burglariously to ravish and carnally know one Z forcibly and against her will; *or*, with intent then in said dwelling-house, &c. of his malice aforethought burglariously and feloniously to kill and murder one Z; *or* the pleader may couple by the conjunction *and* as many felonious intents as he pleases, which is practically better than a separate count for each intent[1]]; and then and there [as in the last section, alleging a substantive felony committed in the place broken and entered *if the pleader chooses;* but there is probably no authority for saying that two or more such offences may be joined[2]]; against the peace, &c.[3]

Met. 236; Reg. *v.* Lawes, 1 Car. & K. 62; Lyons *v.* People, 68 Ill. 271. Even the first is not necessary on a statute which defines the offence, instead of creating it by the use of the word "burglary," and does not contain the word "burglary" or "burglarious." Tully *v.* Commonwealth, 4 Met. 357; Lyons *v.* People, supra.

[1] Ante, § 19–21; Crim. Proced. II. § 150.

[2] The larceny or other felony committed being deemed, in this form of the indictment, merged in the burglary, it might at first seem that as many actual felonies as intents could be alleged in one count. But the difficulty is, that the conviction may be for the felony committed, if the breaking and entering are not proved. So that, should a larceny, a rape, and a murder be charged in this part of the count as actually committed, then, should the proof of the breaking and entering fail, there would be a conviction, on a single count, of larceny, and rape, and murder, — a result contrary to all rule. And see Crim. Proced. II. § 143, and the places there cited.

[3] For forms see 3 Chit. Crim. Law, 1117–1121; 6 Cox C. C. App. 16, 17, 115–117; Rex *v.* Marshall, 4 Went. Pl. 52; Rex *v.* Turner, 6 Howell St. Tr. 565; Rex *v.* Comer, 1 Leach, 4th ed. 36; Rex *v.* Jones, 1 Leach, 4th ed. 537; Rex *v.* Mouncer, 2 Leach, 4th ed. 567; Rex *v.* Vandercomb, 2 Leach, 4th ed. 708, 1 Ben. & H. Lead. Cas. 2d ed. 516; Rex *v.* Jenks, 2 Leach, 4th ed. 774; Rex *v.* Dannelly, Russ. & Ry. 310; Rex *v.* Byford, Russ. & Ry. 521; Rex *v.* Marshall, 1 Moody, 158; Rex *v.* Watkins, 2 Moody, 217, Car. & M. 264; Rex *v.* Compton, 7 Car. & P. 139; Reg. *v.* Lawes, 1 Car. & K. 62; Reg. *v.* Clarke, 1 Car. & K. 421; Reg. *v.* Howell, 1 Cox C. C. 190; Reg. *v.* Nicholas, 1 Cox C. C. 218; Reg. *v.* Frowen, 4 Cox C. C. 266; Kerkin *v.* Jenkins, 9 Cox C. C. 311; Reg. *v.* Thompson, 11 Cox C. C. 362; Reg. *v.* Bailey, Dears. 244, 6 Cox C. C. 241; Reg. *v.* Parsons, Law Rep. 1 C. C. 24.

Alabama. — Mason *v.* The State, 42 Ala. 543; Fisher *v.* The State, 46 Ala. 717; Anderson *v.* The State, 48 Ala. 665; Murray *v.* The State, 48 Ala. 675; Newman *v.* The State, 49 Ala. 9; Paris *v.* The State, 49 Ala. 25; Ward *v.* The State, 50 Ala. 120; Pines *v.* The State, 50 Ala. 153; Beall *v.* The State, 53 Ala. 460; Davis *v.* The State, 54 Ala. 88; Snow *v.* The State, 54 Ala. 138; Matthews *v.* The State, 55 Ala. 65; Adams *v.* The State, 55 Ala. 143; Pond *v.* The State, 55 Ala. 196; Rowland *v.* The State, 55 Ala. 210; Hurt *v.* The State, 55 Ala. 214; Murphy *v.* The State, 63 Ala. 1; Stone *v.* The State, 63 Ala. 115; Graves *v.* The State, 63 Ala. 134; Borum *v.* The State, 66 Ala. 468; Williams *v.* The State, 67 Ala. 183.

Arkansas. — Bradley *v.* The State, 32 Ark. 704; Dodd *v.* The State, 33 Ark. 517, 518.

California. — People *v.* Burgess, 35 Cal. 115; People *v.* Shaber, 32 Cal. 36; People *v.* Taggart, 43 Cal. 81; People *v.* Beaver, 49 Cal. 57; People *v.* Mitchell, 55 Cal. 236; People *v.* Nelson, 58 Cal. 104.

Connecticut. — Lewis *v.* The State, 16 Conn. 32.

Georgia. — Griffin *v.* The State, 26 Ga. 493; Loyd *v.* The State, 42 Ga. 221; Williams *v.* The State, 46 Ga. 212; Wood *v.* The State, 46 Ga. 322; Bethune *v.* The State, 48 Ga. 505; Goldsmith *v.* The State, 63 Ga. 85.

Illinois. — Lyons *v.* People, 68 Ill. 271.

Indiana. — Edwards *v.* The State, 62 Ind. 34.

§ 255. **In Daytime.** — Where, by the statutory terms, the offence consists of the breaking, entering, &c. in the daytime, the

Iowa. — The State *v.* Jones, 10 Iowa, 206; The State *v.* Reid, 20 Iowa, 413; The State *v.* Morrissey, 22 Iowa, 158; The State *v.* Hayden, 45 Iowa, 11; The State *v.* Ridley, 48 Iowa, 370; The State *v.* Short, 54 Iowa, 392.

Kansas. — The State *v.* Cassady, 12 Kan. 550; The State *v.* Foekler, 22 Kan. 542; The State *v.* Thompson, 23 Kan. 338; The State *v.* McAnulty, 26 Kan. 533.

Louisiana. — The State *v.* Morris, 27 La. An. 480; The State *v.* Malloy, 30 La. An. 61; The State *v.* Curtis, 30 La. An. 814.

Maine. — The State *v.* Carver, 49 Maine, 588; The State *v.* Bartlett, 55 Maine, 200.

Massachusetts. — Tully *v.* Commonwealth, 4 Met. 357; Carlton *v.* Commonwealth, 5 Met. 532; Josslyn *v.* Commonwealth, 6 Met. 236; Larned *v.* Commonwealth, 12 Met. 240; Commonwealth *v.* Williams, 2 Cush. 582; Commonwealth *v.* Doherty, 10 Cush. 52; Commonwealth *v.* Tivnon, 8 Gray, 375; Jennings *v.* Commonwealth, 105 Mass. 586; Commonwealth *v.* Glover, 111 Mass. 395; Commonwealth *v.* Reynolds, 122 Mass. 454; Commonwealth *v.* Darling, 129 Mass. 112; Commonwealth *v.* Moore, 130 Mass. 45; Commonwealth *v.* Whalen, 131 Mass. 419.

Michigan. — Koster *v.* People, 8 Mich. 431; Moore *v.* People, 47 Mich. 639; Hall *v.* People, 43 Mich. 417, 418.

Mississippi. — Roberts *v.* The State, 55 Missis 421.

Missouri. — Conner *v.* The State, 14 Misso. 561, 565; The State *v.* Tutt, 63 Misso. 595, 596; The State *v.* Dooly, 64 Misso. 146; The State *v.* Beckworth, 68 Misso. 82: The State *v.* Butterfield, 75 Misso. 297, 298.

Nevada. — The State *v.* Ah Sam, 7 Nev. 127.

New Hampshire. — The State *v.* Squires, 11 N. H. 37; The State *v.* Canney, 19 N. H. 135; The State *v.* Rand, 33 N. H. 216; The State *v.* Blaisdell, 49 N. H. 81.

New York. — Butler *v.* People, 4 Denio, 68; Fellinger *v.* People, 15 Abb. Pr. 128; People *v.* Van Gaasbeck, 9 Abb. Pr. N. S. 328; People *v.* Smith, 1 Parker C. C. 329.

North Carolina. — The State *v.* Jim, 3 Murph. 3; The State *v.* Dozier, 73 N. C. 117; The State *v.* Jordan, 75 N. C. 27; The State *v.* Hughes, 86 N. C. 662.

Ohio. — Spencer *v.* The State, 13 Ohio, 401; Hartshorn *v.* The State, 29 Ohio State, 635; Hagar *v.* The State, 35 Ohio State, 268; The State *v.* Beal, 37 Ohio State, 108, 109.

Pennsylvania. — Stewart *v.* Commonwealth, 4 S. & R. 194; Stoops *v.* Commonwealth, 7 S. & R. 491; Hackett *v.* Commonwealth, 3 Harris, Pa. 95; Hollister *v.* Commonwealth, 10 Smith, Pa. 103; Rolland *v.* Commonwealth, 1 Norris, Pa. 306.

Rhode Island. — The State *v.* Colter, 6 R. I. 195.

Tennessee. — Davis *v.* The State, 3 Coldw. 77; Wynne *v.* The State, 5 Coldw. 319; Pardue *v.* The State, 4 Baxter, 10; Adkinson *v.* The State, 5 Baxter, 569; Wormack *v.* The State, 6 Lea, 146.

Texas. — The State *v.* Robertson, 32 Texas, 159; The State *v.* Williams, 41 Texas, 98; Shepherd *v.* The State, 42 Texas, 501; Johnson *v.* The State, 1 Texas Ap. 146, 150; White *v.* The State, 1 Texas Ap. 211; Scarcy *v.* The State, 1 Texas Ap. 440, 441; Martin *v.* The State, 1 Texas Ap. 525, 527; Simms *v.* The State, 2 Texas Ap. 110; Conoly *v.* The State, 2 Texas Ap. 412; Coleman *v.* The State, 2 Texas Ap. 512; Burke *v.* The State, 5 Texas Ap. 74, 76; Reeves *v.* The State, 7 Texas Ap. 276; Brown *v.* The State, 7 Texas Ap. 619, 620; Webster *v.* The State, 9 Texas Ap. 75; Mace *v.* The State, 9 Texas Ap. 110, 111; Summers *v.* The State, 9 Texas Ap. 396; Hamilton *v.* The State, 11 Texas Ap. 116; Cohea *v.* The State, 11 Texas Ap. 622; Lawson *v.* The State, 13 Texas Ap. 264.

Vermont. — The State *v.* Clark, 42 Vt. 629; The State *v.* Bishop, 51 Vt. 287.

Virginia. — Vaughan *v.* Commonwealth, 17 Grat. 576; Walker *v.* Commonwealth, 28 Grat. 969; Johnson *v.* Commonwealth, 29 Grat. 796.

West Virginia. — The State *v.* McDonald, 9 W. Va. 456; The State *v.* Betsall, 11 W. Va. 703, 705.

Wisconsin. — Powell *v.* The State, 52 Wis. 217.

United States. — United States *v.* Paul,

allegations are the same as in the foregoing formula, except as to time. If the statutes make the same acts punishable in a particular way when committed in the night, and less heavily when committed in the day, the averment of time, at least by the better opinion, may be that they were done on a day named, with no mention of the hour; while, if in fact they transpired in the night, the defendant may be convicted, yet only the punishment for day-breaking can be imposed.[1] Or the allegation may be, —

That, &c. [as in the foregoing formula], on, &c. about the hour of three in the afternoon of said day [*or*, in the daytime of said day], &c.[2]

§ 256. **Principals of Second Degree and Accessories.** — The methods of joining principals of the second degree, and accessories both before and after the fact, which last include under the modern statutes receivers of goods feloniously stolen, are explained in an earlier chapter.[3] Some references to cases containing forms in burglary and other like breakings may be convenient.[4]

§ 257. **Degrees.** — The division of burglary into degrees, in two or three of the States, creates in them some questions as to the indictment.[5] But they are simple, and the reader can refer to the cases cited for forms.[6]

II. *The Indictment for the Attempt.*

§ 258. **By Solicitation.** — Filling up the outline of the indictment for a criminal solicitation already given,[7] we have the following form for the misdemeanor of a solicitation to commit a

6 Pet. 141 (place within the jurisdiction of the United States).

[1] Crim. Proced. II. § 133 *a*; Commonwealth *v.* Reynolds, 122 Mass. 454, 456, 457; Butler *v.* People, 4 Denio, 68; Summers *v.* The State, 9 Texas Ap. 396, 398. Apparently contra is Hall *v.* People, 43 Mich. 417.

[2] Rex *v.* Marshall, 4 Went. Pl. 52; Rex *v.* Mouncer, 2 Leach, 4th ed. 567; Rex *v.* Marshall, 1 Moody, 158; Rex *v.* Byford, Russ. & Ry. 521; The State *v.* Jim, 3 Murph. 3; The State *v.* Colter, 6 R. I. 195.

[3] Ante, § 113–118.

[4] **Against Principal and Accessory before the Fact.** — Rex *v.* Dannelly, Russ. & Ry. 310; The State *v.* Carver, 49 Maine, 588; Commonwealth *v.* Glover, 111 Mass. 395; Hartshorn *v.* The State, 29 Ohio State, 635; Loyd *v.* The State, 42 Ga. 221; Cohea *v.* The State, 11 Texas Ap. 622. **Against Principal and Receiver of the Goods.** — Commonwealth *v.* Darling, 129 Mass. 112.

[5] Crim. Proced. II. § 130 and cases there cited.

[6] The State *v.* Tutt, 63 Misso. 595, 596; Butler *v.* People, 4 Denio, 68.

[7] Ante, § 106.

felonious burglary, good at the common law, and equally so upon a statute if duly expanded to cover its terms, —

That A, &c. on, &c. at, &c. [maliciously devising and intending to procure and cause the commission of the felony hereinafter specified[1]], did then and there solicit and incite one X burglariously and feloniously in the night-time to break and enter the dwelling-house of Y, at, &c.[2] and then feloniously to steal, take, and carry away the goods and chattels therein found[3] [*or*, then and therein of his malice aforethought feloniously to kill and murder the said Y; *or*, then and therein feloniously to ravish and carnally know the said Y forcibly and against her will; *or*, if the pleader chooses, he may insert all these and other felonious intents in the one count, connecting them by the conjunction *and*[4]]; against the peace, &c.

§ 259. **By Unsuccessful Act.** — Filling up in this place also an outline already given,[5] we have the following, good at the common law, and upon any statute the words of which it duly covers, —

That A, &c. on, &c. about the hour of eleven in the night-time of the same day, at, &c. with the malicious [and felonious[6]] intent then and there burglariously and feloniously to break and enter the dwelling-house of one X there situate, and feloniously to steal, take, and carry away the goods and chattels therein found, did then and there burglariously and feloniously put his hands upon a closed window of said dwelling-house and endeavor to raise the same, and with a false key and with some other implement to the jurors unknown endeavor to open a closed outer door of said dwelling-house; against the peace, &c.[7]

§ 260. **Same by taking Impression of Key, &c.** — Under a statute in terms as given in another chapter,[8] following the unwritten law, the allegations may be, —

That A, &c. on, &c. [no need to say here in the night], at, &c. unlawfully [and feloniously[9]] devising and intending burglariously and feloni-

[1] I do not understand that this matter in brackets, however appropriate we may deem it, is of strict rule necessary. Crim. Proced. II. § 74; ante, § 195.

[2] It is not essential that the place of the solicited burglary should be in the county of the indictment. Crim. Proced. I. § 53, 57.

[3] It is evident that no other allegation of time than that it was in the night is necessary to these averments, and probably none of place; because, in point of law, it is immaterial when and where the solicited burglary was to be committed.

[4] Crim. Proced. I. § 439; II. § 74, 93.

[5] Ante, § 111.

[6] Required only when the indictment is on a statute making the attempt a felony.

[7] Compare with forms in Hackett *v.* Commonwealth, 3 Harris, Pa. 95; The State *v.* Jordan, 75 N. C. 27.

[8] Ante, § 194.

[9] Necessary only where the attempt is felony.

ously to break and enter in the night-time the storehouse of X there situate, and feloniously to steal, take, and carry away the goods and chattels therein found, did then and there, to facilitate such breaking and entering, unlawfully, [feloniously], and privately take an impression of the key which unlocked an outer door of said storehouse, and from said impression did then and there make and prepare a false key for the unlocking, breaking, and entering of said storehouse; against the peace, &c.[1]

§ 261. **Possessing Implements.** — Under a statute to punish as a felon one "who shall knowingly have in his possession any engine, machine, tool, or implement adapted and designed for cutting through, forcing, or breaking open any building, room, vault, safe, or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid," the allegations may be, —

That A, &c. on, &c. at, &c. did feloniously and knowingly have in his possession thirty false keys,[2] &c. adapted and designed for forcing and breaking open houses, stores, shops, rooms, safes, trunks, and vaults, in order feloniously to steal, take, and carry away therefrom such money and other property capable of being stolen as might be found therein; he the said A then and there feloniously, knowing the said implements and tools to be adapted and designed for the said purpose, intending to use and employ them therefor; against the peace, &c.[3]

[1] Griffin *v.* The State, 26 Ga. 493. See ante, § 194 and note.

[2] It is not necessary to say, as in the form before me, "certain implements, that is to say, thirty," &c.; for the court will judicially know that the things mentioned are implements. Ante, § 187, note, and places there referred to.

[3] Commonwealth *v.* Tivnon, 8 Gray, 375. For other forms, see Archb. Crim. Pl. & Ev. 19th ed. 550; 6 Cox C. C. App. 66; Reg. *v.* Bailey, Dears. 244, 6 Cox C. C. 241; Reg. *v.* Thompson, 11 Cox C. C. 362. **Being Found in Dwelling-house with intent to steal,** Kerkin *v.* Jenkins, 9 Cox C. C. 311; 6 Cox C. C. App. 67. **Armed with Intent to break into house.** 6 Cox C. C. App. 66, 68.

For BURIALS, see SEPULTURE.
BURNING BUILDINGS, see ARSON, &c.
BY-LAWS, see ante, § 133–136, 171.
CARNAL ABUSE, see RAPE, &c.

CHAPTER XIX.

CARRYING WEAPONS.[1]

§ 262. **Common-law**[2] **Indictment.** — Slightly modifying and abridging the terms of an indictment adjudged good at the common law, we have the following: —

That A, &c. on, &c. at, &c. did arm himself with pistols, guns, knives, and other dangerous and unusual weapons, and thereupon while so armed did then and there, both in the night-time and in the daytime, go forth into the highways and other public places exhibiting himself to the people there, and then and there to and in the presence of the said people did publicly proclaim and declare it to be his purpose and intent, and it then and there was his purpose and intent, to beat, wound, kill, and murder one X and other persons there being, whereby the public peace was then and there broken, and all persons then and there being were greatly terrified; against the peace, &c.[3]

§ 263. **Formula on Statute.** — The statutes creating this offence differ so much in their terms and meaning that it becomes specially difficult to construct a general formula for the indictment on them. The following may be of some service: —

That A, &c. [ante, § 74–77] on, &c. at, &c. [ante, § 80], did go about the streets and other public places there [*or* otherwise as the particular statutory terms may require], carrying concealed upon his person [*or* openly carrying and exhibiting to the terror of the people, *or* otherwise following the statutory terms and meaning] two deadly weapons, to wit, a pistol loaded with powder and ball, and a bowie-knife; he the said A not being then and there a traveller [*or* otherwise negativing the exceptions of the statute]; against the peace, &c. [ante, § 66–69].[4]

[1] For the direct discussion of this offence, including the pleading, practice, and evidence, see Stat. Crimes, § 781–801. Incidental, Ib. § 238; Crim. Proced. I. § 588.

[2] Stat. Crimes, § 784.

[3] The State *v.* Huntly, 3 Ire. 418.

[4] For forms see Rex *v.* Dennis, Trem. P. C. 330; Reg. *v.* Jarrald, Leigh & C. 301, 9 Cox C. C. 307.

Alabama. — The State *v.* Click, 2 Ala. 26; Jones *v.* The State, 63 Ala. 27.

Arkansas. — Wilson *v.* The State, 33 Ark. 557; Carr *v.* The State, 34 Ark. 448; Walker *v.* The State, 35 Ark. 386.

Indiana. — The State *v.* Swope, 20 Ind.

§ 264. **Concealed Weapon.** — Under a statute making it a punishable misdemeanor in "every person, not being a traveller, who shall wear or carry any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly weapon, concealed," the allegations may be, —

That A, &c. on, &c. at, &c. not being then and there a traveller, did carry concealed about his person a fire-arm called a revolver, which then and there was a dangerous weapon; against the peace, &c.[1]

§ 265. **Same on another Statute.** — Under a statute making it a punishable misdemeanor "if any person shall hereafter carry any concealed deadly weapons, other than an ordinary pocket-knife, except as provided in the next section," the indictment, when the matter of the next section is of a sort not required by the rules of pleading to be negatived therein,[2] may be, —

That A, &c. on, &c. at, &c. did carry concealed [about his person[3]] a certain deadly weapon commonly called a slung-shot, and other deadly weapons to the jurors unknown, every one of said deadly weapons being other than an ordinary pocket-knife; against the peace, &c.[4]

§ 266. **Carrying privately, to Terror.** — Upon a statute making it a punishable misdemeanor to "privately carry any dirk, large knife, pistol, or any dangerous weapon, to the fear or terror of any person," it is good in allegation to say, —

That A, &c. on, &c. at, &c. unlawfully did privately carry, to the fear and terror of persons then and there being, a certain large knife, which then and there was a dangerous weapon; against the peace, &c.[5]

106; The State *v.* Judy, 60 Ind. 138; Ridenour *v.* The State, 65 Ind. 411; The State *v.* Boss, 74 Ind. 80.

Kentucky. — Commonwealth *v.* McClanahan, 2 Met. Ky. 8.

Massachusetts. — Commonwealth *v.* O'Connor, 7 Allen, 583; Commonwealth *v.* Doherty, 103 Mass. 443.

North Carolina. — The State *v.* Newsom, 5 Ire. 250.

Tennessee. — The State *v.* Wilburn, 7 Baxter, 57, 63; Porter *v.* The State, 7 Baxter, 106; The State *v.* Bentley, 6 Lea, 205.

Texas. — Scott *v.* The State, 40 Texas, 503; Smith *v.* The State, 42 Texas, 464; Porter *v.* The State, 1 Texas Ap. 477; Lewis *v.* The State, 2 Texas Ap. 26; Leatherwood *v.* The State, 6 Texas Ap. 244; Rainey *v.* The State, 8 Texas Ap. 62; Pickett *v.* The State, 10 Texas Ap. 290.

[1] The State *v.* Swope, 20 Ind. 106.

[2] Crim. Proced I. § 636–639.

[3] These words are not in the form before me; but, if the court should interpret the statute as embracing them in meaning, so that it would not be an offence to carry the weapon apart from the person in a trunk or under the seat of a vehicle in which one was riding, the indictment would probably be held ill without them. Crim. Proced. I. § 623–628; Stat. Crimes, § 796.

[4] Commonwealth *v.* McClanahan, 2 Met. Ky. 8.

[5] The State *v.* Bentley, 6 Lea, 205.

§ 267. **Armed into Assembly, not being Officer.** — Where it is a statutory misdemeanor for one to "go into any church or religious assembly," &c. and "have or carry about his person a pistol or other fire-arm, &c. unless an officer of the peace," the allegations may be, —

That A, &c. on, &c. at, &c. unlawfully did go into a certain religious assembly of persons met for public religious worship, near, &c. and did then and there in said assembly have and carry on his person a certain pistol, he the said A not being then and there an officer of the peace; against the peace, &c.[1]

§ 268. **Having Dangerous Weapon when arrested.** — Under a statute making punishable for misdemeanor one who, "when arrested upon a warrant of a magistrate issued against him for an alleged offence against the laws of this State, &c. is armed with, or has on his person, slung-shot, metallic knuckles, billies, or other dangerous weapon,"[2] it is believed to be sufficient in averment to say, —

That A, &c. on, &c. at, &c. being duly and lawfully arrested by X, a constable of said town, on a valid and sufficient warrant duly issued by Y, esquire, a justice of the peace in and for said county having lawful jurisdiction in the premises, for and on a charge of larceny alleged to have been theretofore committed by the said A in said county,[3] then and there, while being so arrested, was armed with and did have on his person a certain dangerous weapon, to wit, a pistol loaded with gunpowder and a leaden bullet, and capped; against the peace, &c.[4]

[1] Porter *v.* The State, 1 Texas Ap. 477.

[2] Mass. Gen. Stats. c. 164, § 10.

[3] On the question of the sufficiency of this part of the form, see the elucidations of the chapter beginning ante, § 91.

[4] Commonwealth *v.* Doherty, 103 Mass. 443. And see the form in Commonwealth *v.* O'Connor, 7 Allen, 583, on another clause of the same statute. See Stat. Crimes, § 796.

For CATTLE, see ANIMALS.
CEMETERIES, see SEPULTURE.
CHALLENGE TO FIGHT, see DUELLING.

CHAPTER XX.

CHAMPERTY AND MAINTENANCE.[1]

§ 269. **Practical Disuse.** — The importance of the title Champerty and Maintenance in the criminal law consists of the relation of these offences to our civil jurisprudence. For the pure criminal wrong, as distinguished from the conspiracy to disturb the current of justice in the courts, there are no modern prosecutions either in England or the United States. Still, —

§ 270. **Form for Maintenance.** — The books give us a form of the indictment for maintenance, differing in minor particulars, but nearly the same in substance in all of them, and the practitioner may possibly find a use for it. There may be room for the question whether its allegations are not in terms too general.[2] It is, —

That A, &c. on, &c. at, &c. did unjustly and unlawfully maintain and uphold a certain suit, which was then and there depending in the court of, &c. [naming the court], between X as plaintiff and Y as defendant, in a plea of, &c. [saying what, and perhaps particularizing the subject of the suit], to the hindrance and disturbance of the public justice of the State; against the peace, &c.[3]

[1] For the direct expositions of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 121–140; Crim. Proced. II. § 154–156. Incidental, Crim. Law, I. § 307, 541, 942, note; Stat. Crimes, § 232.

[2] Crim. Proced. II. § 154–156.

[3] 2 Chit. Crim. Law, 234; Rex *v.* Langrish, Trem. P. C. 176; Rex *v.* Price, Trem. P. C. 177; 2 Stark. Pl. 2d ed. 704; Train & H. Prec. 371; 2 Morris St. Cas. App. 1804; Davis Prec. 164; Burn Just. tit. Maintenance.

CHAPTER XXI.

CHEATS AT COMMON LAW.[1]

§ 271. **Nature and Importance.** — The numerous modern statutes against obtaining money and goods by false pretences have so far covered the indictable ground as almost to withdraw the attention of prosecutors from the common-law cheat. Yet, except in the two or three States in which there are no common-law offences, the common law of cheat can often be invoked with effect to reach cases which, by accident, the technical terms of the statutes have failed to include. The expositions in "Criminal Law" will show that the law of this subject is reasonably plain; though there are some nice questions upon which doubts and differences of judicial opinion may arise.

§ 272. **Formula for Indictment.** — The indictment may charge, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], having in his possession a false token calculated and adapted to deceive, mislead, and cheat persons of ordinary caution and prudence, to wit, &c. [saying in what the false token consisted; *or*, the pleader may otherwise so describe the transaction that the false token will appear], and then and there devising and intending thereby to cheat and defraud one X [*or*, whomsoever he could cheat and defraud], did then and there, &c. [saying what], all of which was, as the said A then and there well knew, false [and, in proper circumstances, pointing out more minutely the falsity]; by means whereof the said X, relying thereon and having faith and confidence in the truth thereof, did then and there, &c. [saying what X did, and otherwise explaining the fraud; *or*, instead of this, the indictment may, if the facts require, stop short so as to set out merely an attempt to cheat]; against the peace, &c. [ante, § 66–69].[2]

[1] For the direct discussions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 141–168; Crim. Proced. II. § 158–161. Incidental, Crim. Law, I. § 571, 582–585; Stat. Crimes, § 260, 847. And compare with CONSPIRACY — FALSE PRETENCES, &c.

[2] For forms see Trem. P. C. 85–110, 228, 258, 268 (not all of the forms here being, according to the later decisions, good); 4 Went. Pl. 55, 73–79, 357–359; 6 Ib. 389–392; 2 Chit. Crim. Law, 527, 539; 3 Ib. 698–700, 1000–1004, 1017; Matthews Crim. Law, 472; Archb. Crim. Pl. & Ev.

§ 273. **Selling by False Scales — (Common Form).** — The common English indictment for selling by false scales is, with its verbiage, —

That A, &c. on, &c. and from thence until the taking this inquisition [the *continuando* is needless in setting out this offence, but if the pleader elects [1] to employ it, let him follow the slightly different words given ante, § 83], [at, &c. which is better than to lay the place as below], did use and exercise the trade and business of a shopkeeper, and during that time did deal in the buying and selling by weight of divers goods, wares, and merchandises [to wit, at the parish aforesaid, in the county aforesaid. Not necessary if the place is laid as above]; and that the said A [being a person of a wicked and depraved mind [2]], and contriving and fraudulently intending to cheat and defraud the subjects of our said Lord the King [whilst he the said A used and exercised his said trade and business, to wit, on the said —— day of ——, and on divers other days and times between that day and the day of taking this inquisition, at the parish aforesaid, in the county aforesaid [3]], did knowingly, unlawfully, wilfully, and publicly keep in a certain shop there, wherein the said A did so as aforesaid carry on his said trade and business, a certain false pair of scales for the weighing of goods, wares, and merchandises by him sold and disposed of in the way of his said trade and business; which said scales were then and there,[4] by artful and deceitful ways and means, so made and constructed as to cause the goods, wares, and merchandises weighed therein and sold by the said A as aforesaid to appear of much greater weight than the real and true weight thereof, to wit, by one-eighth part of such apparent weight; and that the said A [on the day and year aforesaid, at the parish aforesaid, in the county aforesaid [5]], he the said A then and there well knowing the said

10th Lond. ed. 296; Rex *v.* Snead, 2 Show. 339; Rex *v.* Govers, Say. 206; Reg. *v.* Macarty, 6 Mod. 301, 2 Ld. Raym. 1179; Rex *v.* Wheatly, 2 Bur. 1125, 1 W. Bl. 273; Rex *v.* Bower, Cowp. 323; Rex *v.* Haynes, 4 M. & S. 214; Rex *v.* Lara, 2 Leach, 4th ed. 647, 6 T. R. 565; Reg. *v.* Marsh, 1 Den. C. C. 505, 3 Cox C. C. 570; Reg. *v.* Eagleton, Dears. 376, 515, 6 Cox C. C. 559; Reg. *v.* Closs, Dears. & B. 460, 7 Cox C. C. 494.

Massachusetts. — Commonwealth *v.* Hearsey, 1 Mass. 137; Commonwealth *v.* Warren, 6 Mass. 72, 74.

New York. — People *v.* Babcock, 7 Johns. 201; People *v.* Fish, 4 Parker C. C. 206.

North Carolina. — The State *v.* Simpson, 3 Hawks, 620; The State *v.* Justice, 2 Dev. 199; The State *v.* Burrows, 11 Ire. 477; The State *v.* Corbett, 1 Jones, N. C. 264; The State *v.* Boon, 4 Jones, N. C. 463; The State *v.* Smith, 75 N. C. 141.

Virginia. — Commonwealth *v.* Speer, 2 Va. Cas. 65.

United States. — District of Columbia. United States *v.* Watkins, 3 Cranch C. C. 441, 495.

[1] Ante, § 81.

[2] Not necessary. Ante, § 46.

[3] It is equally good in law while it is briefer to say "then and there;" or, if this is deemed doubtful, "there during the time aforesaid," as at ante, § 84.

[4] If "then and there" are not good in the place in brackets above, they are not in this place.

[5] This method of laying the time is awkward, and probably ill for uncertainty; because the *continuando* extends the "aforesaid" time over many days. The other method should be preferred.

scales to be false as aforesaid, did knowingly, wilfully, and fraudulently sell and utter to one X [a subject of our said Lord the King[1]] certain goods in the way of the said trade of him the said A, to wit, a large quantity of sugar weighed in and by the said false scales as and for twenty pounds' weight of sugar, whereas in truth and in fact the weight of the said sugar so sold and falsely weighed as aforesaid was short and deficient of the said weight of twenty pounds, to wit, by one-eighth part of the said weight of twenty pounds [to wit, at the parish aforesaid, in the county aforesaid[2]]; [to the great damage of the said X, to the evil example of all others[3]], and against the peace, &c.[4]

§ 274. **False Dice.** — Adhering less closely to the mere words of forms in the old books, and rejecting what is certainly rubbish, we have, —

That A, &c. on, &c. at, &c. unlawfully and maliciously devising and intending to cheat and defraud one X, did then and there procure and cause the said X to play with him the said A, for money and other valuable things, with dice, at a certain unlawful game called, &c. [naming the game, though probably this is not strictly necessary]; and in and for the playing of the said unlawful game the said A then and there fraudulently, craftily, and secretly procured and caused to be used false dice, knowing them to be false, and the said X being as the said A well knew then and there ignorant of the said falsity and believing the said dice to be true and just; whereby, and by means of other falsity whereof the said X was likewise ignorant in the playing of said game, the said A did then and there fraudulently, deceitfully, and craftily cause himself to appear, and cause the said X to accept such appearance as and for truth, to win of the said X the sum of ten dollars in money and current bank-bills; which said sum, in truth and in justice then and there belonging to the said X, he the said A did then and there convert and appropriate to his own use, cozening and cheating so as aforesaid the said X out of the same; against the peace, &c.[5]

§ 275. **False Marks on Goods.** — A dealer who puts on an article a false trade-mark, or any other like false mark, and by means of

[1] Useless.

[2] This repetition of the place is not needed.

[3] Unnecessary. Ante, § 48.

[4] Matthews Crim. Law, 472; 3 Chit. Crim. Law, 1000. In Archbold there are slight, yet not material, changes in the expression. Archb. Crim. Pl. & Ev. 19th ed. 533. It more nearly follows one of the counts of an indictment in five counts, in Rex *v.* Hill, 6 Went. P. C. 389. And compare with 6 Cox C. C. App. 61, 62; Rex *v.* Wheatly, 2 Bur. 1125, 1 W. Bl. 273; People *v.* Fish, 4 Parker C. C. 206. **False Measure.** — For buying and selling by false measure, &c., see Rex *v.* Smith, Trem. P. C. 268; Rex *v.* Wheatly, supra; 4 Went. Pl. 358; 3 Chit. Crim. Law, 1004; Reg. *v.* Eagleton, Dears. 376, 515, 6 Cox C. C. 559; Rex *v.* Osborn, 3 Bur. 1697.

[5] Rex *v.* Arnope, Trem. P. C. 91; Rex *v.* Betsworth, Trem. P. C. 93. And compare with Rex *v.* Sidney, 6 Went. Pl. 391.

it sells the article for one of superior manufacture and for an enhanced price, to the defrauding of the purchaser, commits a cheat indictable at the common law.[1] If, for example, to the copy of a picture of a famous artist the name of the artist is attached, and then it is thus fraudulently and knowingly sold as being the original painting, the allegations against the seller may be, —

That heretofore, and before the commission of the offence hereinafter recited, one M, of, &c. was an artist in painting of great celebrity and wide fame, so that his original productions were worth large prices in the market; and that A, &c. [the defendant], on, &c. at, &c. being a dealer in pictures, and being possessed of a worthless copy of one of the valuable pictures of the said M, knowing it to be a copy and devising fraudulently to sell it for a price greatly beyond its true value, did then and there cause the name of the said M to be painted thereon; and did then and there, knowing the said picture to be a copy and not an original, fraudulently, wilfully, and falsely represent and pretend to one X, who was then and there desirous of purchasing an original painting of the said M, that the said copy was such original, and, in confirmation thereof, showed to the said X the said name of the said M so as aforesaid fraudulently painted on said copy; whereupon the said X, relying on said name so fraudulently painted upon said copy, and on the said false representation and explanation thereof by said A, did then and there under the belief so fraudulently induced that said copy was said M's original painting, pay to the said A therefor the sum of five hundred dollars in money and current bank-bills, whereof the said A did then and there so as aforesaid cheat and defraud him; against the peace, &c.[2]

§ 276. **False Writing.** — A false writing may be such a false token that a fraud effected through it will be an indictable cheat at the common law;[3] though, in practice, the indictment will commonly be for forgery. The following is a sample of the allegations for cheat: —

That A, &c. on, &c. at, &c. having in his hands and possession a fictitious bank-note, purporting to be issued by the bank of, &c. in the State of, &c. and to be signed by M as president and countersigned by N as cashier, in form and appearance like the bank-bills which circulate as money in this State, for the sum of twenty dollars, payable to the bearer on demand, and there being no such bank and no such president and cashier, and the said

[1] Reg. *v.* Closs, Dears. & B. 460, 466, 467, 7 Cox C. C. 494; Crim. Law, II. § 147, 150.

[2] Reg. *v.* Closs, supra. And see, for other forms in analogous cases, 2 Chit. Crim. Law, 539; Rex *v.* Edwards, Trem. P. C. 103; Rex *v.* Farmer, Trem. P. C. 109; Rex *v.* Poulson, Trem. P. C. 103; Rex *v.* Worrell, Trem. P. C. 106.

[3] Crim. Law, II. § 148, 149.

fictitious bank-note being utterly worthless, all of which the said A then and there well knew, did then and there, by color and means thereof, and by delivering it to one X, and pretending to him that it was a good and valid bank-note and worth twenty dollars, fraudulently and deceitfully obtain of said X six dollars in good and current bank-bills and money, and fifteen yards of cloth of the value of fourteen dollars; against the peace, &c.[1]

§ 277. **In Conclusion,** — while these forms do not completely cover the subject, they are sufficiently varied to enable the practitioner readily to draw whatever he may desire.

[1] Commonwealth *v.* Speer, 2 Va. Cas. 65; Rex *v.* Govers, Say. 206; 3 Chit. Crim. Law, 1001, 1004; 4 Went. Pl. 73, 75, 77. If this were an indictment for forgery, it would be necessary to set out the fictitious bank-bill or other false writing by its tenor. Crim. Proced. II. § 401, 403. And so is the form for a cheat by a false letter in Reg. *v.* Saunders, Trem. P. C. 100. But probably cheat rests on a different reason, as to this question, from forgery. At all events, the forms generally in cheat accord with the one propounded in the text, though they are not numerous. And such, with some exceptions, is the approved method in the statutory cheat of obtaining money and goods by false pretences. Crim. Proced. II. § 178. Thus, in Rex *v.* Govers, supra, which was a case of common-law cheat, a motion in arrest of judgment was overruled, the allegations being, —

That A, &c. [on, &c. at, &c.] intending to cheat X, did deceitfully take upon himself the style and character of a merchant, and did deceitfully affirm to X that he was a merchant, and had received divers commissions from Spain; and that, in order to induce X to believe that he was a merchant, and had received such commissions, and to induce X to give him credit, the defendant did deceitfully produce to X several paper writings, which he falsely affirmed to be letters from Spain, containing commissions for jewels, watches, and other goods, to the amount of four thousand pounds; by means whereof he did get into his hands two watches, the property of X; whereas in truth the defendant was not a merchant, and the paper writings containing such commissions were false and counterfeit.

Still it is possible that the form of the indictment, which appears thus in the report, is not there given in full. And, assuming it to be complete, the case is not conclusive of the old law; for the present question was not raised, and only the indictability of the transaction was affirmed by the court. And, on the whole, there is, as to some cases, fair ground to argue to a court, from the analogies of forgery, libel, and some others, that the tenor should in them be set out.

For CHILD MURDER, see CONCEALMENT OF BIRTH.
CHILDREN, CARNAL ABUSE OF, see RAPE, &c.
CHURCH, see DISTURBING MEETINGS.
CITY ORDINANCES, see ante, § 133–136, 171.
COHABITATION, see ADULTERY, &c. — INCEST.
COIN, see COUNTERFEITING, &c.
COMMON BARRATOR, see NUISANCE.
COMMON SCOLD, see NUISANCE.
COMPOUNDING, see ante, § 123–127.
CONCEALED WEAPONS, see CARRYING WEAPONS.

CHAPTER XXII.

CONCEALMENT OF BIRTH, OR CHILD MURDER.[1]

§ 278. **Following the Statute — Formula.** — This offence being purely statutory, the indictment simply follows the terms of the interpreted[2] statute; with a due setting out of the particulars to individualize the transaction, and the introduction of the word "feloniously" where the offence is felony. Thus, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80] being delivered of a child which was then and there born alive and a bastard, and the said child afterward then and there dying [*or*, if the statutory words are different, follow them], did afterward then and there maliciously [and feloniously] endeavor to secrete and conceal the dead body thereof, by, &c. [saying what she did[3]], so that it could not be known whether the same was born alive or not, &c. [*or*, employing such other words as are in the statute; *or*, on a statute worded differently from what is thus supposed, that A, &c. as above, being pregnant with a child which, if born alive, would be a bastard, was then and there willingly and of her own procurement delivered thereof in secret, and, the said child then and there being dead, she did then and there by, &c. conceal the death thereof, so that it is not known whether it was born dead, or alive and was murdered]; against the peace, &c. [ante, § 66–69].[4]

[1] For the direct elucidations of this offence, with the pleading, practice, and evidence, see Stat. Crimes, § 763–780. Incidental, Crim. Proced. I. § 465, 527.

[2] Ante, § 32, 33.

[3] Stat. Crimes, § 778.

[4] For forms see Archb. Crim. Pl. & Ev. 10th Lond. ed. 435; 19th ed. 773; 6 Cox C. C. App. 113; Rex *v.* Walters, Car. & M. 164; Rex *v.* Coxhead, 1 Car. & K. 623.

Arkansas. — Sullivan *v.* The State, 36 Ark. 64.

Missouri. — The State *v.* White, 76 Misso. 96.

Pennsylvania. — Commonwealth *v.* Clark, 2 Ashm. 105; Douglass *v.* Commonwealth, 8 Watts, 535.

Rhode Island. — The State *v.* Sprague, 4 R. I. 257.

For CONCEALMENT OF CRIME, see ante, § 129.
CONCEALMENT OF OFFENDER, see ante, § 118, 122.
CONGREGATION, see DISTURBING MEETING.

CHAPTER XXIII.

CONSPIRACY.[1]

§ 279. **How Chapter divided.** — We shall consider the forms for, I. The Indictment in General; II. The Indictment for Particular Conspiracies. Following which will be, III. Practical Suggestions.

I. *The Indictment in General.*

§ 280. **Preparation.** — One who would draw an indictment for conspiracy should begin by familiarizing himself with the law of the offence, both in general and under the statutes and decisions of his own State. Not every indictment good in one State is so also in every other. Nor, in a work like the present, made for use in all the States, is it possible to lay down such directions and forms as will supersede the necessity of the pleader's looking and seeing for himself. Some things to which his particular attention should be directed are —

§ 281. **The County.** — Since he has his choice to lay the venue either in the county of the original unlawful confederation, or in that wherein any overt act pursuant thereto transpired,[2] he should select a county with careful reference to the various considerations, prominent among which is the facility of proving the venue. Again, —

[1] For the direct discussions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 169–240; Crim. Proced. II. § 202–245. Incidental, Crim. Law, I. § 432, 592, 593, 597 *a*, 633–639, 767, 768, 792, 801, 814, 974; II. § 86, 124, 452, 505; Crim. Proced. I. § 61, 437, 464, 468, 516, 530, 644, 1019, 1022, 1038, 1248; Stat. Crimes, § 260, 625, 629, 688, 803.

[2] Crim. Proced. I. § 61; II. § 206, 236.

§ 282. **Overt Act.** — He should see whether or not it is necessary, under the statutes and adjudications of his State, to lay, what is not required by the common law, one or more overt acts, and whether such acts are essential to the constitution of the offence itself,[1] and frame his allegations to satisfy the law in this respect. Moreover, —

§ 283. **Nature of "Unlawful."** — Conspiracy being the corrupt agreeing together of two or more persons to do, by concerted action, something *unlawful*, either as a means or an end,[2] he should acquaint himself with the meaning of "unlawful" as held in his own State. By the English common law, and the adjudications believed to be the more numerous with us, "unlawful" is not in this connection a synonym for criminal, but it includes also what is forbidden on the civil side of our jurisprudence. Yet the tribunals in some of our States, rather by a series of blunders than by any enlightened examinations of the question, have assumed that "unlawful" means, in criminal conspiracy, indictable; so that, for example, an allegation of a conspiracy to cheat a person named of his money and goods, cheating being necessarily unlawful but not necessarily criminal, is not good, unless criminal methods are set out, — contrary to the English and better American doctrine.[3] The pleader must be careful not to mistake how this question is regarded in his own State.

§ 284. **Rule for Indictment.** — In conspiracy, the same as in any other misdemeanor,[4] the rule for the indictment is, that, with reasonable particularity and individualization, it must aver facts which together constitute in matter of law *prima facie* guilt;[5] and, if it is on a statute, it must pursue therein the substantial statutory terms.[6] Therefore the pleader is required to know what constitutes guilt under the administration of this branch of our jurisprudence in his own State.

§ 285. **Formula.** — Unless resulting from some statute, there are probably in the indictment for conspiracy no words so technical as not to admit of substitutes. In the beaten track, a good formula is, —

[1] Crim. Law, II. § 192, 193; Crim. Proced. II. § 205, 206, 217, 222.

[2] Crim. Law, II. § 171.

[3] Crim. Law, II. § 172, 178, 185, 198–202; Crim. Proced. II. § 207–209, 212–217.

[4] Crim. Proced. I. § 532–537.

[5] Ib. I. § 326, 329–331, 335, 493, 509, 513, 513 *a*, 519, 523, 566–584; II. § 217.

[6] Ib. I. § 610–612.

That A, &c. [ante, § 74–77], B, &c. [ante, § 74–77], and, &c. [adding, in the same way, the names of any other persons whom it is desirable to include as defendants[1]], on, &c. at, &c. [ante, § 80],[2] unlawfully and maliciously did conspire, combine, and confederate together[3] to, &c. [say what. If the thing thus set down is such as the law deems "unlawful," within the meaning of the word in the definition of conspiracy,[4] the offence is fully charged, and the indictment may conclude here, unless a statute has required an overt act. If such thing is not in this sense unlawful, then the pleader must proceed to allege unlawful means; thus], by, &c. [proceeding to set out the means whereby the thing was by the conspirators agreed to be accomplished.[5] Here, by the common law, and under most, not all, of our statutes, the indictment may, if the pleader chooses, conclude. But he may elect to add overt acts,[6] or the statute may require them. Then the allegations proceed]: And in pursuance of the said unlawful and malicious combination and conspiracy, the said A, B, &c. did afterward, on, &c. at, &c. [here setting out as many and such overt acts as the pleader deems advisable]; against the peace, &c. [ante, § 66–69].[7]

[1] The indictment sometimes proceeds, "together with sundry other persons whose names are to the jurors unknown." For explanations, see Crim. Proced. II. § 225; Crim. Law, II. § 187, 188. There are circumstances in which an allegation of this sort will serve some useful purpose, but generally it does not.

[2] As to the place see ante, § 281.

[3] Crim. Proced. II. § 205.

[4] Ante, § 283.

[5] It is not necessary to give time and place to this; because, in matter of law, it is not material when and where the object of the conspiracy was to be carried out.

[6] Crim. Proced. II. § 205, 206.

[7] For forms see 2 Chit. Crim. Law, 29, 36; 3 Ib. 1145–1193; Archb. Crim. Pl. & Ev. 10th ed. 672, 678, 19th ed. 1005, 1013; 4 Went. Pl. 79–146; 6 Ib. 375–383, 387, 398, 439, 443; 1 Cox C. C. App. 11, 13; 4 Ib. App. 13, 35, 38; 5 Ib. App. 8, 9; 6 Ib. App. 63–65, 79, 81, 157; 7 Ib. App. 15; 8 Ib. App. 14; Rex *v.* Turner, Trem. P. C. 82; Rex *v.* Crispe, Trem. P. C. 83; Rex *v.* Freeman, Trem. P. C. 85. Rex *v.* Gostwick, Trem. P. C. 187; Rex *v.* Dingley, Trem. P. C. 213; Rex *v.* Grey, Trem. P. C. 215, 9 Howell St. Tr. 127; Rex *v.* Knox, 7 Howell St. Tr. 763; Reg. *v.* Denew, 14 Howell St. Tr. 895; Rex *v.* Fowke, 20 Howell St. Tr. 1077, 1143, 1185; Rex *v.* Walker, 23 Howell St. Tr. 1055, 1078; Rex *v.* Redhead, 25 Howell St. Tr. 1003; Rex *v.* Dunn, 26 Howell St. Tr. 839; Rex *v.* Glennan, 26 Howell St. Tr. 437; Rex *v.* Hedges, 28 Howell St. Tr. 1315; Rex *v.* Hanson, 31 Howell St. Tr. 1; Reg. *v.* Wright, 2 Cox C. C. 336; Reg. *v.* Bailey, 4 Cox C. C. 390; Reg. *v.* Duffield, 5 Cox C. C. 404; Reg. *v.* Whitehouse, 6 Cox C. C. 38; Reg. *v.* Whitehouse, 6 Cox C. C. 129; Reg. *v.* Hamp, 6 Cox C. C. 167; Reg. *v.* Yates, 6 Cox C. C. 441; Reg. *v.* Brown, 7 Cox C. C. 442; Reg. *v.* Lewis, 11 Cox C. C. 404; Reg. *v.* Gurney, 11 Cox C. C. 414; Reg. *v.* Bunn, 12 Cox C. C. 316; Reg. *v.* Banks, 12 Cox C. C. 393, 5 Eng. Rep. 471; Reg. *v.* Hibbert, 13 Cox C. C. 82, 13 Eng. Rep. 433; White *v.* Reg. 13 Cox C. C. 318; Reg. *v.* Parnell, 14 Cox C. C. 508; Rex *v.* Ferguson, 2 Stark. 489; Rex *v.* Roberts, 1 Camp. 399; Rex *v.* Pollman, 2 Camp. 229; Rex *v.* Serjeant, Ryan & Moody N. P. 352; Rex *v.* Bykerdike, 1 Moody & R. 179; Rex *v.* Richardson, 1 Moody & R. 402; Rex *v.* Fowle, 4 Car. & P. 592; Rex *v.* Hamilton, 7 Car. & P. 448; Reg. *v.* Murphy, 8 Car. & P. 297; Reg. *v.* Vincent, 9 Car. & P. 91; Reg. *v.* Vincent, 9 Car. & P. 275; Reg. *v.* Shellard, 9 Car. & P. 277; Reg. *v.* Goldshede, 1 Car. & K. 657; Reg. *v.* Hall, 1 Fost. & F. 33; Reg. *v.* Esdaile, 1 Fost. & F. 213, 8 Cox C. C. 69; Reg. *v.* Kohn, 4 Fost. & F. 68; Reg. *v.* Howell, 4 Fost. & F. 160; Reg. *v.* Barry, 4 Fost. & F. 389; Rex *v.* Hevey, 1 Leach, 4th ed.

§ 286. **Common Form, with Overt Acts — (To Cheat).** — The common method of laying this offence appears in the following familiar form from the English books: —

232; Rex *v.* Eccles, 1 Leach, 4th ed. 274; Reg. *v.* Steel, 2 Moody, 246, Car. & M. 337; Reg. *v.* Mears, 2 Den. C. C. 79, 4 Cox C. C. 423; Reg. *v.* Rowlands, 2 Den. C. C. 364, 5 Cox C. C. 436, 466, 17 Q. B. 671; Reg. *v.* Carlisle, Dears. 337; Reg. *v.* Bullock, Dears. 653; Reg. *v.* Hudson, Bell, 263, 8 Cox C. C. 305; Rex *v.* Opie, 1 Saund. 300; Rex *v.* Thorp, 5 Mod. 218, 221; Reg. *v.* Best, 6 Mod. 137, 185, 2 Ld. Raym. 1167; Rex *v.* Spragg, 2 Bur. 993; Rex *v.* Vipont, 2 Bur. 1163; Rex *v.* Rispal, 3 Bur. 1320; Rex *v.* Eccles, 3 Doug. 337; Rex *v.* Woolf, 1 Chit. 401; Wakefield's Case, 2 Lewin, 1, 7; Rex *v.* Hollingberry, 2 Ben. & H. Lead. Cas. 2d ed. 34, 6 D. & R. 345, 4 B. & C. 329; Rex *v.* De Berenger, 3 M. & S. 67; Rex *v.* Hunt, 3 B. & Ald. 566; Rex *v.* Biers, 1 A. & E. 327; Rex *v.* Seward, 1 A. & E. 706; Reg. *v.* Peck, 9 A. & E. 686; Reg. *v.* Parker, 3 Q. B. 292; Reg. *v.* O'Connor, 5 Q. B. 16; Reg. *v.* Kenrick, 5 Q. B. 49; Reg. *v.* Blake, 6 Q. B. 126; Reg. *v.* King, 7 Q. B. 782, 795; Reg. *v.* Gompertz, 9 Q. B. 824, 2 Cox C. C. 145; Reg. *v.* Button, 11 Q. B. 929, 3 Cox C. C. 229; Reg. *v.* Thompson, 16 Q. B. 832, 5 Cox C. C. 166; Latham *v.* Reg. 5 B. & S. 635, 9 Cox C. C. 516; Mulcahy *v.* Reg. Law Rep. 3 H. L. 306, 307; Heymann *v.* Reg. Law Rep. 8 Q. B. 102; Reg. *v.* Warburton, Law Rep. 1 C. C. 274; Reg. *v.* Aspinall, 1 Q. B. D. 730, 2 Q. B. D. 48, 13 Cox C. C. 231.

Alabama. — The State *v.* Cawood, 2 Stew. 360; The State *v.* Murphy, 6 Ala. 765; Miles *v.* The State, 58 Ala. 390.

Connecticut. — The State *v.* Rowley, 12 Conn. 101; The State *v.* Bradley, 48 Conn. 535.

Illinois. — Johnson *v.* People, 22 Ill. 314; Smith *v.* People, 25 Ill. 17; Cole *v.* People, 84 Ill. 216, 220; Evans *v.* People, 90 Ill. 384.

Indiana. — Landringham *v.* The State, 49 Ind. 186; The State *v.* McKinstry, 50 Ind. 465; Scudder *v.* The State, 62 Ind. 13.

Iowa. — The State *v.* Jones, 13 Iowa, 269; The State *v.* Potter, 28 Iowa, 554; The State *v.* Stevens, 30 Iowa, 391; The State *v.* Harris, 38 Iowa, 242; The State *v.* Savoye, 48 Iowa, 562.

Kentucky. — Commonwealth *v.* Blackburn, 1 Duv. 4.

Maine. — The State *v.* Mayberry, 48 Maine, 218; The State *v.* Clary, 64 Maine, 369.

Maryland. — The State *v.* Buchanan, 5 Har. & J. 317; Bloomer *v.* The State, 48 Md. 521.

Massachusetts. — Commonwealth *v.* Ward, 1 Mass. 473; Commonwealth *v.* Judd, 2 Mass. 329; Commonwealth *v.* Tibbetts, 2 Mass. 536; Commonwealth *v.* Kingsbury, 5 Mass. 106; Commonwealth *v.* Davis, 9 Mass. 415; Commonwealth *v.* Hunt, 4 Met. 111; Commonwealth *v.* Harley, 7 Met. 506; Commonwealth *v.* Eastman, 1 Cush. 189; Commonwealth *v.* Kellogg, 7 Cush. 473; Commonwealth *v.* Shedd, 7 Cush. 514; Commonwealth *v.* O'Brien, 12 Cush. 84; Commonwealth *v.* Prius, 9 Gray, 127; Commonwealth *v.* Wallace, 16 Gray, 221; Commonwealth *v.* Walker, 108 Mass. 309; Commonwealth *v.* Waterman, 122 Mass. 43; Commonwealth *v.* Barnes, 132 Mass. 242; Commonwealth *v.* Fuller, 132 Mass. 563.

Michigan. — People *v.* Richards, 1 Mich. 216; People *v.* Clark, 10 Mich. 310; People *v.* Arnold, 46 Mich. 268.

Minnesota. — The State *v.* Pulle, 12 Minn. 164.

Nebraska. — Gandy *v.* The State, 10 Neb. 243, 245.

New Hampshire. — The State *v.* Straw, 42 N. H. 393; The State *v.* Parker, 43 N. H. 83; The State *v.* Hadley, 54 N. H. 224.

New Jersey. — The State *v.* Rickey, 4 Halst. 293; The State *v.* Norton, 3 Zab. 33; Johnson *v.* The State, 2 Dutcher, 313; The State *v.* Young, 8 Vroom, 184, 185; The State *v.* Hickling, 12 Vroom, 208; Noyes *v.* The State, 12 Vroom, 418.

New York. — People *v.* Trequier, 1 Wheeler, Crim. Cas. 142; People *v.* Melvin, 2 Wheeler Crim. Cas. 262; People *v.* Barrett, 1 Johns. 66; Lambert *v.* People, 7 Cow. 166; People *v.* Mather, 4 Wend.

That A, &c. B, &c. and C, &c. [being evil-disposed persons and wickedly devising and intending to defraud and prejudice certain persons hereinafter mentioned[1]], on, &c. [with force and arms[2]], at, &c. did amongst themselves conspire, combine, confederate, and agree together falsely and fraudulently to cheat and defraud certain underwriters hereinafter mentioned, of divers large sums of money [this allegation of the conspiracy is sufficient according to the rulings in England and a part of our States, while in other States more must be added as already explained.[3] Proceeding, next, to the overt acts]: And [the jurors aforesaid upon their oath aforesaid do further present[4]], that the said A, B, and C, afterwards, to wit, on the [date of the policy], at, &c. aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves, had as aforesaid, did cause and procure a certain ship called the M, and certain goods in and on board the said ship, to be insured by certain underwriters, to wit, by X, Y, Z, and U, and the said underwriters then and there[5] severally executed a certain policy of insurance upon the said ship, and upon the said goods so laden on board the said ship as aforesaid, upon and for a voyage from the port of London to the island of Saint Vincent in the West Indies: And [the jurors aforesaid upon their oath aforesaid do further present[6]], that the said A, B, and C, afterwards, and after the said ship sailed from the port of London aforesaid, upon the voyage aforesaid, to wit, on the fourth day of September, in the year aforesaid, in further pursuance of and according to the said conspiracy, combination, confed-

229, 232; People *v.* Fisher, 14 Wend. 9; People *v.* Chase, 16 Barb. 495.

North Carolina. — The State *v.* Tom, 2 Dev. 569; The State *v.* Enloe, 4 Dev. & Bat. 373; The State *v.* Trammell, 2 Ire. 379.

Pennsylvania. — Commonwealth *v.* Franklin, 4 Dall. 255; Respublica *v.* Ross, 2 Yeates, 1; Respublica *v.* Hevice, 2 Yeates, 114, 3 Wheeler Crim. Cas. 505; Commonwealth *v.* Eberle, 3 S. & R. 9; Collins *v.* Commonwealth, 3 S. & R. 220; Hartmann *v.* Commonwealth, 5 Barr, 60; Commonwealth *v.* Putnam, 5 Casey, Pa. 296; Williams *v.* Commonwealth, 10 Casey, Pa. 178; Commonwealth *v.* Bartilson, 4 Norris, Pa. 482; Wilson *v.* Commonwealth, 15 Norris, Pa. 56; Huntzinger *v.* Commonwealth, 1 Out. Pa. 336; Commonwealth *v.* McHale, 1 Out. Pa. 397; Commonwealth *v.* Delany, 1 Grant, Pa. 224; Commonwealth *v.* Boyer, 2 Wheeler Crim. Cas. 140; Commonwealth *v.* Foering, Brightly, 315; Commonwealth *v.* English, 11 Philad. 439; Commonwealth *v.* Goldsmith, 12 Philad. 632.

South Carolina. — The State *v.* Shooter, 8 Rich. 72; The State *v.* Cardoza, 11 S. C. 195.

Texas. — Brown *v.* The State, 2 Texas Ap. 115.

Vermont. — The State *v.* Keach, 40 Vt. 113.

Virginia. — Jones *v.* Commonwealth, 31 Grat. 836.

Wisconsin. — The State *v.* Crowley, 41 Wis. 271; Casper *v.* The State, 47 Wis. 535.

United States. — United States *v.* Spalding, 4 Cranch C. C. 616; United States *v.* De Grieff, 16 Blatch. 20; United States *v.* Walsh, 5 Dil. 58; United States *v.* Crosby, 1 Hughes, 448; United States *v.* Fehrenback, 2 Woods, 175; United States *v.* Dennee, 3 Woods, 47, 48.

[1] Not necessary. Ante, § 45, 46, 48.

[2] Unnecessary. Ante, § 43.

[3] Ante, § 282–284, and places there referred to.

[4] Not necessary. Ante, § 64, 115, note.

[5] If two different times or places have been specified, "then and there" will be ill for the uncertainty as to which is meant. Crim. Proced. I. § 414.

[6] Not necessary. See above.

eracy, and agreement amongst themselves, had as aforesaid, did remove and unlade from on board the said ship divers goods insured as aforesaid, of great value, to wit, of the value of four hundred pounds, before the said ship had reached the port or place of destination aforesaid [to wit, at the parish aforesaid, in the county aforesaid[1]]: And [the jurors aforesaid upon their oath aforesaid do further present[2]], that, in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves, had as aforesaid, the said A, B, and C, afterwards, to wit, on the twentieth day of September, in the year aforesaid, on the high seas [to wit, at the parish aforesaid, in the county aforesaid[3]], did cut, bore, and make [and did cause and procure to be cut, bored, and made[4]] divers holes in the bottom and sides of the said ship [or vessel[5]], with intent thereby to sink, cast away, and destroy the said ship, and the goods in and upon the said ship so laden as aforesaid, and with intent and design thus and thereby wilfully and maliciously to prejudice the said several persons who had so underwritten the said policy of insurance upon the said ship, and upon the goods so therein and thereupon laden as aforesaid: [to the great damage of the said X, Y, Z, and U, who had so underwritten the said policy as aforesaid[6]], and against the peace, &c.[7]

II. *The Indictment for Particular Conspiracies.*

§ 287. **To Murder.** — The forms for this in the books are more or less loaded with surplusage; but, rejecting what is obviously such, we have, —

[1] **How lay Place of Overt Act.** — To lay thus, under the *videlicet*, the place of the overt act in the county of the indictment when in truth it was elsewhere, seems to be a sort of copying of an old practice in civil cases long since exploded. See, for explanations of it, Gould Pl. c. 3, § 159–161; Steph. Pl. 4th ed. 281 et seq. I can recall no decisions directly to the question; but, if this false allegation were necessary, we should certainly have them in abundance. The question, in legal reason, is plain. To give the court jurisdiction, the locality of the conspiracy must be averred, and it must be the county of the indictment. But as in matter of law overt acts in other counties or abroad are relevant, and proper to be introduced, the indictment cannot be ill which sets them down as transpiring where the proof will show that they did transpire. Quite likely, if they are laid in the county of the trial, the court, in the absence of surprise to the defendant, will permit them to be proved as occurring elsewhere. But the better and orderly course, to put the rule mildly, is to charge them according to the real fact. Crim. Proced. I. § 381.

[2] Not necessary. See above.

[3] See the last note but one.

[4] There is no good reason for inserting these words, though they are not legally objectionable. Ante, § 139 and note, and the places there referred to.

[5] The word "ship" alone has been in the other places used, and it better be here. If "vessel" were not in this place a synonym for "ship," the disjunctive "or" would make the allegation bad. Crim. Proced. I. § 585, 590.

[6] Unnecessary. Ante, § 48.

[7] Archb. Crim. Pl. & Ev. 10th ed. 677, 678. Compare with post, § 290, 291; 6 Went. Pl. 387; Commonwealth *v.* Barnes, 132 Mass. 242; Commonwealth *v.* Prius, 9 Gray, 127; Commonwealth *v.* Kellogg, 7 Cush. 473; Reg. *v.* Kohn, 4 Fost. & F. 68.

That A, &c. and B, &c. on, &c. at, &c. unlawfully, wickedly, and maliciously did conspire, confederate, and agree together feloniously, wilfully, and of their malice aforethought to kill and murder one X [*or*, a certain infant female child of tender age, to wit, of the age of two days, the name whereof is to the jurors unknown, *or* not named]; against the peace, &c.[1]

§ 288. **To commit Burglary — (With Overt Acts).** — Still rejecting from the old forms what is certainly surplusage, we have, —

That A, &c. B, &c. and C, &c. on, &c. at, &c. unlawfully and wickedly did conspire, combine, confederate, and agree together [and with divers other persons whose names are to the jurors unknown[2]], unlawfully [to attempt and endeavor[3]] to feloniously and burglariously break and enter [in the night-time[4]] the dwelling-house of X [there situate[5]], with intent the goods and chattels therein feloniously and burglariously to steal, take, and carry away [if the pleader chooses, he proceeds to allege overt acts, thus]; and, in pursuance of said conspiracy, combination, confederation, and agreement, afterward, on the day and year aforesaid, about the hour of eight in the night-time of the same day, at, &c. aforesaid, the said dwelling-house of the said X unlawfully did attempt feloniously and burglariously to break and enter, with intent the goods and chattels therein feloniously and burglariously to steal, take, and carry away, by then and there endeavoring to break and force open the outer door of the said dwelling-house with an iron crow, and also by then and there endeavoring to open the outer door of the said dwelling-house with a pick-lock key; against the peace, &c.[6]

[1] Rex *v.* Glennan, 26 Howell St. Tr. 437; Rex *v.* Dunn, 26 Howell St. Tr. 839; Reg. *v.* Banks, 12 Cox C. C. 393, 5 Eng. Rep. 471; The State *v.* Tom, 2 Dev. 569. **To Murder one yet Unborn.** — One of the counts in Reg. *v.* Banks, which was treated as good, charged, rejecting surplusage, omitting allegations of overt acts not considered at the trial, and adding the averments of place required by the common law, —

That on, &c. at, &c. A, &c. was delivered of a female child, there and then and still alive, the name whereof is to the jurors unknown, and that, before the said child was born, and while the said A carried and was quick with the said child, on, &c. at, &c. she the said A, and B, &c. did unlawfully and wickedly conspire, confederate, and agree together the said child, if born alive, feloniously, wilfully, and of their malice aforethought to kill and murder; against the peace, &c.

[2] See ante, § 285, note.

[3] These words are in the form in Chitty. The conspiring is itself an "attempt and endeavor;" so that, at least, the indictment will be neater without them.

[4] These words are not in Chitty. I cannot see how, without them, the indictment charges anything more than a conspiring to commit larceny.

[5] I deem these words not only needless, but better omitted. Ante, § 253.

[6] 3 Chit. Crim. Law, 1190. For another form see Brown *v.* The State, 2 Texas Ap. 115. **Other Felonies.** — For conspiring to commit other felonies, larceny, robbery, and rape. The State *v.* McKinstry, 50 Ind. 465; Landringham *v.* The State, 49 Ind. 186; Scudder *v.* The State, 62 Ind. 13; The State *v.* Murphy, 6 Ala. 765. **Adultery.** — For a conspiracy to commit adultery. Miles *v.* The State, 58 Ala. 390.

§ 289. **To cheat by False Token — (Dice).** — An awkwardly-constructed form in Chitty may be so modified as to charge, reasonably well, —

That A, &c. B, &c. and C, &c. on, &c. at, &c. falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree together to cheat and defraud, by such unlawful means as they should thereafter deem available, and likewise by the means of false dice to be employed at play and in gaming, divers people whose names are to the jurors unknown, and also those persons who are hereinafter mentioned as having been cheated and defrauded, of large sums of money; and, in pursuance of the same conspiracy, combination, confederacy, and agreeing together, then and there in a certain room parcel of the dwelling-house of one M there, did fraudulently, unlawfully, and deceitfully produce and deliver to divers people then and there assembled to play at dice, thirty false, deceitful, and loaded dice, knowing them to be such, to be then and there used in play, and the same were then and there used and played with by divers people so assembled for the purpose aforesaid; by means whereof, divers people then and there so playing with the said dice as aforesaid, not knowing the same to be false, deceitful, and loaded dice, did then and there lose large sums of money, and in particular one X did then and there so lose twenty dollars, one Y did then and there so lose fifteen dollars, and one Z did then and there so lose fifty dollars, by playing respectively with certain other persons to the jurors unknown, with the said false, deceitful, and loaded dice, and were then and there and thereby severally cheated and defrauded of said respective sums of money; against the peace, &c.[1]

§ 290. **By Statutory False Pretences.** — The pleader should have regard to the terms of the statutes against cheating by false pretences, and to the special facts of his case. While he will set out overt acts if the law of his State makes them essential elements in the offence,[2] or if otherwise he deems their introduction into the indictment practically wise,[3] the allegations for the conspiracy itself, alone adequate under the common-law rules, may be, —

That A, &c. and B, &c. on, &c. at, &c. maliciously and unjustly devising to cheat and defraud one X, did then and there falsely and fraudulently conspire, combine, confederate, and agree together to get and obtain, knowingly and designedly, by means of false pretences[4] [*or*, by some opinions

[1] 3 Chit. Crim. Law, 1160. And see for a form for cheating by one of the conspirators appearing to have little skill in gaming, and thereby inducing a looker-on to play with him, Reg. *v.* Bailey, 4 Cox C. C. 390. Conspiring to cheat by false tokens, Collins *v.* Commonwealth, 3 S. & R. 220. To defraud a bank by **Overdrawing and False Entries**, Commonwealth *v.* Foering, Brightly, 315.

[2] Ante, § 282.

[3] Ib.; Crim. Proced. II. § 205, 206.

[4] In some of the precedents, the words "against the form of the statute in that

this not being enough, by means of, &c. setting out briefly the particular false pretences agreed to be employed[1]], one horse, of the value[2] of six hundred dollars, the property of him the said X,[3] with the intent then and there to cheat and defraud the said X thereof [*or*, in any other like general way, it not being necessary to descend to the particularity required in the indictment for the actual statutory cheat, state any other facts which would constitute an indictable fraud under the statute]; against the peace, &c.[4]

§ 291. **Other Conspiracy to cheat.** — All cheating being "unlawful," — that is, contrary to the law as administered in the civil department, or in the criminal, or in both, — persons who mutually undertake to employ their combined powers to cheat another, while yet they have not considered of the means, commit thereby an indictable conspiracy. Such is, at least, the English and better American doctrine.[5] Hence, since in the nature of things an indictment cannot allege contemplated means where none have been contemplated, and every indictment is good which fully sets out an offence whether in few words or in many,[6] it is adequate to allege, where no more of fact exists or is to be proved, —

That A, &c. and B, &c. on, &c. at, &c. did unlawfully and maliciously conspire, combine, confederate, and agree together to cheat and defraud one X of his goods and chattels [*or*, &c. specifying in any other appropriate

case made and provided" are added here. From most they are omitted, and I see no reason to suppose they are deemed essential.

[1] As, see Commonwealth *v.* Wallace, 16 Gray, 221; Commonwealth *v.* Walker, 108 Mass. 309; Commonwealth *v.* Fuller, 132 Mass. 563.

[2] Generally, in our States, the value does not affect, as of law, the punishment to be inflicted for the conspiracy; and, where it does not, it need not be alleged. See ante, § 174, note, and the places there referred to.

[3] For the rule for describing the things and their ownership, see Crim. Proced. II. § 210, 211.

[4] Johnson *v.* People, 22 Ill. 314; The State *v.* Crowley, 41 Wis. 271; People *v.* Clark, 10 Mich. 310; Latham *v.* Reg. 5 B. & S. 635, 9 Cox C. C. 516; Reg. *v.* Kenrick, 5 Q. B. 49; Reg. *v.* Parker, 3 Q. B. 292; Rex *v.* Gill, 2 B. & Ald. 204. For other forms see Reg. *v.* Whitehouse, 6 Cox C. C. 38; People *v.* Barrett, 1 Johns. 66; Commonwealth *v.* Ward, 1 Mass. 473; Commonwealth *v.* Kingsbury, 5 Mass. 106; Reg. *v.* Barry, 4 Fost. & F. 389; People *v.* Arnold, 46 Mich. 268; Respublica *v.* Ross, 2 Yeates, 1; Commonwealth *v.* Delany, 1 Grant, Pa. 224; Williams *v.* Commonwealth, 10 Casey, Pa. 178; 3 Chit. Crim. Law, 1180, 1186; 4 Went. Pl. 80, 89; 6 Ib. 378; 4 Cox C. C. App. 13, 35; 6 Ib. App. 64, 65, 157.

[5] Ante, § 283 and the places there referred to. "When parties have once agreed to cheat a particular person of his moneys, although they may not then have fixed on any means for that purpose, the offence of conspiracy is complete." Bayley, J. in Reg. *v.* Gill, 2 B. & Ald. 204, 205. "The offence does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means." Lord Mansfield in Rex *v.* Eccles, 1 Leach, 4th ed. 274, 276.

[6] Ante, § 284.

terms the object of the cheat according to the special facts. In those States in which the means are required to be set out, *add*, by, &c. proceeding to specify the means contemplated by the conspirators[1]]; against the peace, &c.[2]

§ 292. **To Assault — Ravish.** — The object of this sort of conspiracy being by all opinions unlawful, the indictment may simply aver, —

That A, &c. and B, &c. on, &c. at, &c. did unlawfully and maliciously conspire, combine, confederate, and agree together to assault, beat, bruise, and wound one X[3] [*or*, to ravish and carnally know one Y, violently and against her will[4]], [*adding* overt acts,[5] or not, as the pleader deems best]; against the peace, &c.

§ 293. **Setting out Contemplated Means — (Something of the Law).** — But when we attempt to pass forward to other cases, we are confronted by the perturbations which some of our American courts have created in the law of the offence and of the indictment, through the rulings already mentioned on the single

[1] Ante, § 285. In this view, see the following cases and the forms therein: The State *v.* Parker, 43 N. H. 83; The State *v.* Straw, 42 N. H. 393; Commonwealth *v.* Fuller, 132 Mass. 563; Commonwealth *v.* Prius, 9 Gray, 127; Commonwealth *v.* Shedd, 7 Cush. 514; Commonwealth *v.* Eastman, 1 Cush. 189; Commonwealth *v.* Davis, 9 Mass. 415; The State *v.* Jones, 13 Iowa, 269; The State *v.* Mayberry, 48 Maine, 218. It is believed that the courts which require this allegation are not agreed as to what it must contain. The pleader should be cautious on this point; for his duty requires him to produce averments, which, while the proofs support them as to the facts, will in law be upheld by the tribunals of his own State. And see ante, § 280–284.

[2] For forms, see, besides the above cases, ante, § 286; Reg. *v.* Gompertz, 9 Q. B. 824, 2 Cox C. C. 145; Sydserff *v.* Reg. 11 Q. B. 245; Reg. *v.* King, 7 Q. B. 782; Reg. *v.* Warburton, Law Rep. 1 C. C. 274; Reg. *v.* Peck, 9 A. & E. 686; Rex *v.* Woolf, 1 Chit. 401; Reg. *v.* Hudson, Bell, 263, 8 Cox C. C. 305; Reg *v.* Carlisle, Dears. 337, 6 Cox C. C. 366; Reg. *v.* Bullock, Dears. 653; Reg. *v.* Steel, 2 Moody, 246, Car. & M. 337; Reg. *v.* Hall, 1 Fost. & F. 33; Reg. *v.* Esdaile, 1 Fost. & F. 213, 8 Cox C. C. 69; Reg. *v.* Lewis, 11 Cox C. C. 404; Rex *v.* Richardson, 1 Moody & R. 402; Reg. *v.* Brown, 7 Cox C. C. 442; Reg. *v.* Gurney, 11 Cox C. C. 414; Rex *v.* Roberts, 1 Camp. 399; Rex *v.* Fowle, 4 Car. & P. 592; Heymann *v.* Reg. Law Rep. 8 Q. B. 102; Reg. *v.* Whitehouse, 6 Cox C. C. 129; 3 Chit. Crim. Law, 1184; 4 Cox C. C. App. 38; 6 Ib. App. 63, 64, 81; 8 Ib. App. 14; People *v.* Richards, 1 Mich. 216; The State *v.* Younger, 1 Dev. 357; Lambert *v.* People, 7 Cow. 166, 9 Cow. 578; Johnson *v.* People, 22 Ill. 314; Evans *v.* People, 90 Ill. 384; The State *v.* Young, 8 Vroom, 184, 185; The State *v.* Rowley, 12 Conn. 101; Commonwealth *v.* Bartilson, 4 Norris, Pa. 482; The State *v.* Buchanan, 5 Har. & J. 317; Bloomer *v.* The State, 48 Md. 521.

[3] For other forms, see Commonwealth *v.* Putnam, 5 Casey, Pa. 296; Rex *v.* Gostwick, Trem. P. C. 187.

[4] For form see The State *v.* Murphy, 6 Ala. 765. It is not necessary to say which of the defendants was to perform the part of principal of the first degree, or whether both were; because, in either case, if they carried out what they meant, they would be jointly guilty of the rape.

[5] Ante, § 285, 286.

question of the conspiracy to cheat individuals.[1] If the courts in the States affected by this suggestion intend really to hold, that no conspiracies can be punished by the criminal law except those wherein either the end or the means contemplated is "unlawful" in the sense of being *indictable* when accomplished without conspiracy, a large part of the law of conspiracy as it existed in England when we derived thence our common law is wiped out in those States, and we have no need of forms for use there for what does not there exist. But, beyond doubt, the English law of conspiracy does prevail in most of our States, and the following forms are meant for use only where it does.

§ 294. **To debauch a Female.** — In some of our States fornication is by statute indictable, and so in some others is the defilement of a girl through seduction.[2] In these States, therefore, a conspiracy to commit either stands on the same ground as to both the offence and the indictment with one to commit a burglary, a rape, an assault, or any other crime.[3] But in other States these derelictions are not crimes. Yet in all seduction is a civil wrong, which the law will redress whenever there is a plaintiff — such, for example, as a master injured by the loss of services of the woman who was his servant,[4] or a husband by the alienation of a seduced wife[5] — to bring the action *rectus in curia*. The woman herself cannot sue because she was a partaker in the wrong,[6] nor can the master[7] or the husband[8] if he was partaker. The State, that is the plaintiff in criminal prosecutions, is always *rectus in curia*, for it can do no wrong.[9] The result of all which is, that, even aside from considerations of public morals, which still should be taken into the account,[10] adultery and fornication are "unlawful," in the sense of being contrary to the law administered in the civil courts, however the rule may be in the crim-

[1] Ante, § 283, 286, 291, and places there referred to.

[2] Stat. Crimes, § 625–652, 691.

[3] Ante, § 287, 288, 292.

[4] Reddie *v.* Scoolt, Peake, 240; Fores *v.* Wilson, Peake, 55; Davidson *v.* Goodall, 18 N. H. 423; Bennett *v.* Allcott, 2 T. R. 166; Satterthwaite *v.* Dewhurst, 4 Doug. 315; Martin *v.* Payne, 9 Johns. 387; Bartley *v.* Richtmyer, 4 Comst. 38; Blagge *v.* Ilsley, 127 Mass. 191.

[5] Van Vacter *v.* McKillip, 7 Blackf. 578; Clouser *v.* Clapper, 59 Ind. 548; Bigaouette *v.* Paulet, 134 Mass. 123.

[6] Paul *v.* Frazier, 3 Mass. 71; Hamilton *v.* Lomax, 26 Barb. 615; Jordan *v.* Hovey, 72 Misso. 574; Buckles *v.* Ellers, 72 Ind. 220.

[7] Richardson *v.* Fouts, 11 Ind. 466.

[8] Hodges *v.* Windham, Peake, 39; Fry *v.* Derstler, 2 Yeates, 278; Cook *v.* Wood, 30 Ga. 891; Bunnell *v.* Greathead, 49 Barb. 106; Sherwood *v.* Titman, 5 Smith, Pa. 77.

[9] Crim. Proced. I. § 224 *b*.

[10] Crim. Law. I. § 500–506; Rex *v.* Delaval, 3 Bur. 1434.

inal; so that on this ground alone a conspiracy to commit either is, even where no unlawful means have been agreed upon, indictable.[1] The indictment, therefore, need not contain averments of "unlawful" means. The form may be simply, —

That A, &c. and B, &c. on, &c. at, &c. unlawfully and maliciously did conspire, combine, confederate, and agree together [by false pretences, false representations, and other fraudulent means[2]] to cause and procure one X, an unmarried woman [*or*, the wife of one Y, *or* an unmarried girl under the age of twenty-one years, *or* an unmarried girl of the tender age of fourteen years] to have carnal intercourse with the said A [*or* with Z, *or* with a man whose name is to the jurors unknown other than the said Y, *or* to become a common prostitute]; against the peace, &c.[3]

§ 295. **Against Marriage.** — Marriage is "lawful." But to violate the laws regulating it, or the legal rights of parents and guardians to forbid indiscreet marriages by persons of immature age or weakened intellect, or the rights of the marrying or married parties themselves, is "unlawful." The indictment for a conspiracy against marriage, therefore, must aver unlawful means,[4] yet not necessarily means which would be indictable if carried into execution without conspiring. Thus, —

§ 296. **To procure Elopement and Marriage.** — The allegations may be, —

That on, &c. at &c. X was an unmarried minor girl of the tender age of fifteen years[5] and Y was her father, and she was then living and abiding under his care, protection, and guardianship, and rendering him her services, in his dwelling-house there [he having then and there the right to control her person and restrain her from entering into any marriage which he might deem to be contrary to her interests[6]]; that A, &c. [one of the

[1] Ante, § 283; Stat. Crimes, § 625; Crim. Law, II. § 235; Smith *v.* People, 25 Ill. 17, 23.

[2] These words are in the form in Reg. *v.* Mears and Smith *v.* People, infra, which was adjudged good. But they are plainly mere surplusage. For, if they are meant to charge contemplated unlawful means, and if such an allegation is necessary, they are not sufficiently definite. This appears in ante, § 290.

[3] Reg. *v.* Mears, 2 Den. C. C. 79, 4 Cox C. C. 423; Smith *v.* People, 25 Ill. 17; Rex *v.* Delaval, supra; Rex *v.* Grey, 9 Howell St. Tr. 127, Trem. P. C. 215; Reg. *v.* Howell, 4 Fost. & F. 160; 5 Cox C. C. App. 8; 6 Ib. App. 79. For a conspiracy to seduce a woman by means of a sham marriage, see The State *v.* Savoye, 48 Iowa, 562.

[4] And see Rex *v.* Fowler, 1 East P. C. 461.

[5] A mistake of her age would not be fatal if the proof showed any other age from which would result the same legal consequences. Crim. Proced. I. § 488 *b*–488 *e*.

[6] Some pleaders will choose to insert a clause like this; though, as the father's rights are of law, which need not be averred, it is not necessary.

defendants], was then and there desirous of marrying the said X, and the said Y [deeming the said proposed marriage prejudicial to her[1]] then and there forbade the same and all intercourse between her and the said A. Whereupon the said A, B, &c. and C, &c. well knowing the premises, did afterward, then and there, unlawfully and maliciously conspire, combine, confederate, and agree together to seduce and assist the said X clandestinely and against the will and without the knowledge of the said Y, her father, to leave and abandon his said dwelling-house, protection, control, and service, and live and abide with the said A, and against the said Y's will and without his knowledge marry the said A [to which, in most cases, the pleader will elect to add overt acts, though in matter of law they are unnecessary except in a few of our States]; against the peace, &c.[2]

§ 297. **To cause a Marriage falsely to appear of Record.** — A public record imports verity, and it is of high interest to parties and the community. To cause, therefore, any such record to be entered up falsely is "unlawful," and especially is it when the record is made to declare falsely a marriage. Therefore an indictment for a conspiracy to commit this wrong need not set forth contemplated means. It may simply aver, —

That A, &c. B, &c. and C, &c. on, &c. at, &c. did unlawfully and maliciously conspire, combine, confederate, and agree together to cause it falsely to appear of record, &c. [specifying some record wherein matter of this sort is by law to be perpetuated], that on, &c. at, &c. one X and one

[1] This clause is, like the other, not necessary, yet such as some may choose to insert.

[2] I have drawn this form without much reference to precedents; for the books contain none which seem to me quite suited to practical use. The supposed facts are similar to those in Commonwealth *v.* Mifflin, 5 Watts & S. 461, wherein the question was whether or not the transaction was indictable, and the court adjudged it to be. The indictment, in two counts, is preserved in Whart. Prec. Nos. 651, 652. The facts as averred in the second count are the ones discussed by the court. In Rex *v.* Thorp, 5 Mod. 218, 221, is the form of an information for a conspiracy to alienate a minor *son*, away at school, from his father, and entice him into marrying a girl (of inferior rank and fortune, if this is material) without his consent. The information seems to have been deemed good, but the case did not proceed to judgment. In Rex *v.* Serjeant, Ryan & Moody N. P. 352, is the form of an indictment for a conspiracy to entice a young man, who was a minor, into marrying a prostitute, without the knowledge or consent of his mother, his father being dead. In Respublica *v.* Hevice, 3 Wheeler Crim. Cas. 505, 3 Yeates, 114, is the form of an indictment for a conspiracy to entice away a young girl under guardianship and procure her marriage when drunk. The indictment in the famous Wakefield's Case, 2 Lewin, 1, 7, where it appears at large, was for a conspiracy to bring about a marriage by abducting the girl through false representations, under constraint of which she gave her consent. A form in Rex *v.* Cobb, 4 Went. Pl. 79, is for a conspiracy, among other things, "to induce the mother and other relations" of a minor girl "to consent to her marrying" one of the conspirators, by giving out and publishing that he "had lain with her," and "had carnal knowledge" of her body, "and had gotten her with child."

Y were, by M, a minister of the gospel [*or* justice of the peace], duly united in marriage [*or*, a less minute setting out of the record will doubtless suffice, especially where in fact it has not been made], whereas in truth neither the aforesaid nor any other marriage between the said X and the said Y ever transpired, and this the said A, B, & C at the said time and place of their said conspiring well knew [adding averments of overt acts or not as the pleader may elect]; against the peace, &c.[1]

§ 298. **To entice away Wife.** — There is in Tremaine an information for a conspiracy to entice from a man his wife, not containing the ordinary element of a purpose for her to live in adultery. This if done by one would be "unlawful," though not indictable. Hence the indictment for the conspiracy need not aver contemplated means. Reducing to modern shape the form, supplying imperfections, and rejecting redundancies, we have, —

That on, &c. at, &c. X and Y his wife were persons married to each other and cohabiting in concord and mutual love; whereupon A, &c. B, &c. and C, &c. did then and there unlawfully and maliciously conspire, combine, confederate, and agree together, by falsehood, enticement, and other wrongful means and devices, to persuade and cause the said Y to hate without cause the said X, and without cause to withdraw herself from cohabitation with him, and without his consent and without cause to live in separation from him in parts and places to him unknown [and, if the conspiracy was successful, it is well to set out her desertion as an overt act]; against the peace, &c.[2]

§ 299. **To procure Divorce.** — It is lawful for a married person to procure a divorce, by honest means, without producing testimony which he knows to be false, or imposing on the court. But to do it otherwise is "unlawful," as a fraud on the law and on the tribunal, a disturbance of the public order, and a wrong to the divorced party, whether the thing done is indictable performed without conspiracy, or not.[3] Hence a conspiracy to obtain

[1] I have before me no precedent for this offence except the needlessly long and complicated indictment in Commonwealth *v.* Waterman, 122 Mass. 43. The court was plainly right in sustaining it, and equally so in the following observation, by Colt, J.: "It is charged that the main purpose of the defendants in this case was to cause a marriage between certain parties falsely to appear of record. This, if successful, would directly tend to impair the value of a public record, necessary for the security of the marriage relation, and the protection of the important rights arising therefrom; and, *if this were the only charge made*, the prosecution might well be maintained." p. 57, 58.

[2] Rex *v.* Dingley, Trem. P. C. 213. I have omitted to say, as in the form before me, that the wife had a separate estate, which the conspirators meant to and did "make a prey of."

[3] And see further for the principle, Crim. Law, II. § 216, 217, 219–221.

a divorce by such unlawful means is indictable because of their unlawfulness, and the indictment must set them out. Thus, —

That A, &c. B, &c. and C, &c. on, &c. at, &c. the said A being then and there the husband of X his wife, did unlawfully and maliciously conspire, combine, confederate, and agree together to procure, and enable and cause the said A to obtain, in form and in fraud of law, a judicial divorce dissolving his marriage with the said X his wife, by the following false, unlawful, and pernicious means; to wit [here setting out the means contemplated]; against the peace, &c.[1]

§ 300. **Falsely to charge with Crime — (Less than Crime, &c.).** — On various grounds it is "unlawful" to charge one falsely with crime, but chiefly because it is both a wrong to the accused person and a disturbance of public justice. Therefore a conspiracy to do this is indictable by reason of the unlawful end, and it is immaterial whether indictable means are contemplated or not.[2] So the indictment for the conspiracy need not contain any setting out of means. It may aver, —

That A, &c. B, &c. and C, &c. on, &c. at, &c. did unlawfully and maliciously conspire, combine, confederate, and agree together falsely to charge and accuse one X with having then lately before feloniously ravished and carnally known the said A violently and against her will [*or*, feloniously and of his malice aforethought killed and murdered one M; *or*, &c. setting out, in the like brief way, such other contemplated accusation of an offence as the proofs will disclose. This is enough. But if the purpose was to extort money, or other thing, in a compounding of the offence or otherwise, or if there was any other specially evil purpose, the pleader may choose to aver it;[3] and, in some cases, where less than a crime was agreed to be charged, this may be necessary]; against the peace, &c.[4]

[1] I have before me but two precedents for this sort of indictment, neither of which is adapted to the present use. Cole *v.* People, 84 Ill. 216, is on a statute; and the indictment in The State *v.* Stevens, 30 Iowa, 391, was held ill on the ground, explained in the preceding parts of this chapter, and accepted in not many of our States, that a conspiracy to be indictable must be to do something which would be a crime if performed without conspiracy; Commonwealth *v.* Nichols, 134 Mass. 531, is partly of this sort.

[2] Crim. Law, II. § 217, 220.

[3] The averment may be inserted in this place, but it is not always. In one case before me (Reg. *v.* Yates, 6 Cox C. C. 441) the pleader says, —

Did conspire, combine, confederate, and agree together to extort money from the said X, by falsely and without any reasonable and probable cause accusing the said X of having defrauded Her Majesty's Inland Revenue.

The form is not greatly dissimilar in Rex *v.* Hollingberry, 2 Ben. & H. Lead. Cas. 2d ed. 34, 6 D. & R. 345.

[4] Crim. Proced. II. § 240; Archb. Crim. Pl. & Ev. 10th Lond. ed. 672, 673; 3 Chit. Crim. Law, 1171, 1174; Rex *v.* Freeman, Trem. P. C. 85; Rex *v.* Spragg, 2 Bur. 993; The State *v.* Hickling, 12 Vroom, 208; Commonwealth *v.* Tibbetts, 2 Mass. 536. More specifically, some of the forms are, to accuse of larceny, The State *v.* Cawood, 2 Stew. 360; Rex *v.* Rispal, 3 Bur.

§ 301. **To injure one in his Business.** — The law protects every person in his lawful business; and to injure one therein is, either in itself or as viewed in connection with particular means, "unlawful." It is "unlawful" simply to prevent a man from carrying on his business, — as, for example, from working at his trade, — so that an indictment for a conspiracy therefor is good without any setting out of means.[1] But competition is permissible, it is beneficial to the public and not opposed to any policy of the law, while yet its consequences may be injurious to persons in the same employment. And the like is true of various other things which men properly do in the pursuit of their own interest. Therefore it may be lawful, or it may be unlawful, for one person to *injure* another in his business, the question depending on the means employed; while, whatever the means, it is always unlawful to *prevent* a carrying on of the business. The distinction, therefore, appears to be, that, while the indictment for a conspiracy to *prevent* one's carrying on his business need make no mention of means, that for a conspiracy to *injure* one therein must set out contemplated means, and they must be "unlawful," — a distinction, however, the application of which will not unfrequently require nice discrimination. Bearing it in mind, —

§ 302. **To injure Actor by Hissing.** — The hissing of an actor is lawful or unlawful according as it expresses feelings which spontaneously arise, or is resorted to for injuring him in his calling. A conspiracy to do it for the latter purpose is, therefore, indictable;[2] and the allegations should set out such a com-

1320; Jones *v.* Commonwealth, 31 Grat. 836. To pervert legal process for the purpose of extorting a deed from one, The State *v.* Shooter, 8 Rich. 72. To lay an information against one for illegal insurance in the lottery and then to obtain money from him to compromise it. 3 Chit. Crim. Law, 1176. To charge a man with having stolen goods from one of the conspirators, and thereby obtaining a promissory note, &c., 3 Chit. Crim. Law, 1175. To accuse one of having committed an unnatural crime, &c., and thereby obtaining money to conceal it, 3 Chit. Crim. Law, 1184. To charge with rape with intent to extort money, 3 Chit. Crim. Law, 1182; with adultery, for the same purpose, Commonwealth *v.* O'Brien, 12 Cush. 84; Commonwealth *v.* Nichols, 134 Mass. 531. With poisoning horses, 4 Went. Pl. 98. With forging a will to defraud heirs, Rex *v.* Thompson, 4 Went. Pl 96. With being the father of a child born of another man's wife, Rex *v.* Turner, Trem. P. C. 82. With being the father of a bastard, 3 Chit. Crim. Law, 1179; Reg. *v.* Best, 6 Mod. 137, 185, 2 Ld. Raym. 1167; Johnson *v.* The State, 2 Dutcher, 313; and see Crim. Proced. II. § 241.

[1] Crim. Proced. II. § 242; Rex *v.* Eccles, 3 Doug. 337, 1 Leach, 4th ed. 274 (where may be seen a form).

[2] Crim. Law, II. § 216, 308 and note.

bination of means and end as will make the criminality of the transaction appear. For example, —

That on, &c. at, &c. X was a person who followed the profession and calling of actor and player at theatres and other places where people assemble for amusement and instruction, by which profession and calling he obtained large gains; and that then and there, at a certain theatre commonly termed the M theatre, a play known as the Merchant of Venice was appointed and to the public announced to be acted and played, wherein the said X was to perform the part of Shylock. Whereupon A, &c. B, &c. C, &c. and D, &c. did then and there, knowing the premises, unlawfully and maliciously conspire, combine, confederate, and agree together to injure and ruin the said X in his said profession and calling, and deprive him of his good name therein and of all future gains therefrom, by hissing and otherwise expressing disapprobation of his performance, and by causing and procuring others to join therein, when he should so appear in said play, without reference to what might be their own real and spontaneous judgment of his said performance, and by thereafter, at all times and places when and where the said X should appear performing any part in his said profession and calling, doing the same in respect of his performance therein, without reference to what should be their own spontaneous opinions, so as by all means to bring about the ruin of the said X in his said profession and calling; against the peace, &c.[1]

§ 303. **To seduce away Workmen — (Under Contract — Not).** — To seduce a workman or any other servant under contract to leave his employer, or probably to seduce any other person to violate a contract, is, if the person seducing knows of the contract, and the one seduced yields and thereby injures the other party, such an "unlawful" act that a civil action for the injury is maintainable.[2] And, where there is no contract, if the seduction of workmen or other servants is malicious and meant to injure the employer, it is in like manner actionable;[3] though, in

[1] The only precedent before me is that in 6 Went. 443, for the nearly identical offence of a conspiracy to ruin an actor by making a great noise at the performance and compelling the manager to discharge him from an engagement. It is too long and verbose, and not precise enough in its forms of allegation, for insertion here. For a form for a conspiracy to seduce people to withdraw their custom from a common brewer, see Rex *v.* Morgan, 4 Went. Pl. 106–111. To ruin gun-makers in their trade, 6 Went. Pl. 439.

[2] Bixby *v.* Dunlap, 56 N. H. 456; Lumley *v.* Gye, 2 Ellis & B. 216; Lee *v.* West, 47 Ga. 311; Salter *v.* Howard, 43 Ga. 601; Haskins *v.* Royster, 70 N. C. 601; Miburne *v.* Byrne, 1 Cranch C. C. 239; Haight *v.* Badgeley, 15 Barb. 499; Scidmore *v.* Smith, 13 Johns. 322; Campbell *v.* Cooper, 34 N. H. 49; Hart *v.* Aldridge, Cowp. 54; Keane *v.* Boycott, 2 H. Bl. 511; Blake *v.* Lanyon, 6 T. R. 221; Morgan *v.* Smith, 77 N. C. 37.

[3] Walker *v.* Cronin, 107 Mass. 555, where the several distinctions are explained. And see Evans *v.* Walton, Law Rep. 2 C. P. 615; Carew *v.* Rutherford, 106

the interest of competition in business, one man is at liberty to hire away the employees of another, to take effect when their contracts have expired, or so otherwise as not to violate any valid agreement.[1] Therefore a conspiracy to seduce from their employers workmen under contract, in breach of the contract, is of itself criminal, and no allegation of unlawful contemplated means is required in the indictment. It may aver, —

That on, &c. at, &c. M was a servant and workman in the employ of and rendering service and labor to X, under a contract theretofore on a valuable consideration made between them, not expired, of full force, and service and labor thereunder remaining due to the said X from the said M,[2] from which the said X would derive large benefits and gains; whereupon A, &c. and B, &c. did, then and there, knowing the premises, and devising to prejudice and injure the said X, unlawfully and maliciously conspire, combine, confederate, and agree together to seduce and entice away the said M from the said X and his said employment and service in breach of the contract aforesaid [probably, in most cases, the pleader will elect to add overt acts]; against the peace, &c.[3]

§ 304. **To seduce away Workmen where no Contract.** — Following up the views already presented,[4] if the object of the conspiracy is to prevent the employer from doing business, it may be charged in the simple manner already pointed out;[5] and the seducing away of workmen who are not under contract, as well as of those who are, may be made to perform the part only of overt

Mass. 1, and other cases cited to this section.

[1] Ib.; Sykes *v.* Dixon, 9 A. & E. 693; Boston Glass Manuf *v.* Binney, 4 Pick. 425; Bird *v.* Randall, 3 Bur. 1345; Nichol *v.* Martyn, 2 Esp. 732; Langham *v.* The State, 55 Ala. 114.

[2] In an action on the contract, this would not be a sufficient allegation of it. But even less would suffice in an action by the master for seducing the servant from him, 2 Chit. Pl. 645 and note; Hambleton *v.* Veere, 2 Saund. 169; Walker *v.* Cornin, 107 Mass. 555; the gist of the action being the wrong and not the contract. The like distinction prevails in criminal pleading. Crim. Proced. I. § 554–558. I think this form of the allegation adequate. If the pleader, for caution, elects to set out the contract more fully, let him be equally careful to avoid a variance between the averment and proof of it, the danger whereof constitutes the objection to following the forms in assumpsit. In Reg. *v.* Duffield, 5 Cox C. C. 404, 408, the part of a count corresponding to the form thus far in our text, and on which there was a conviction, is, —

That on, &c. X "carried on trade and business as a manufacturer of japanned and tin wares at, &c. and that divers, to wit, fifty, persons, being artificers, had contracted with the said X to serve him as workmen and artificers in his said trade and business for certain times and periods respectively agreed upon between them and the said X, and that the said persons so being such artificers as aforesaid have entered into the service of the said X as such manufacturer as aforesaid."

[3] Compare with the forms in Reg. *v.* Duffield, supra.

[4] Ante, § 301, 303.

[5] Ante, § 301 and the places there referred to.

acts. Or, whether the purpose is such, or merely to injure in a less degree the employer in his business, the allegations may be, —

That on, &c. at, &c. X was a manufacturer of tin ware, employing in his said business workmen to the number of one hundred and more, and deriving therefrom large gains; whereupon A, &c. B, &c. C, &c. D, &c. and sundry other persons whose names are to the jurors unknown, did, then and there, having no guardianship over said workmen, and not devising to promote in any lawful way any interests of their own, but of malice toward the said X, and planning, purposing, and intending to injure him in his said business, and to ruin him therein, and to prevent his thereafter carrying it on, unlawfully and maliciously conspire, combine, confederate, and agree together to persuade, entice, induce, and cause each and every one of the workmen so employed by the said X to leave him and his said employment at such time and times as would most injure and prejudice him therein; and in like manner and to the like end seduce and keep away from entering into his employment in said business all other workmen; causing them and the before-mentioned workmen to idle away their time and waste their substance, to the detriment alike of themselves and of all other people of the State;[1] against the peace, &c.[2]

§ 305. **To compel Workman — Employer to discharge him.** — To close against a workman every avenue to employment, unless he will do what the law does not require of him, is to prevent his working, — a conspiracy to do which is indictable without any allegation of contemplated means.[3] Or the averments may be, if so are the facts, —

That A, &c. B, &c. C, &c. D, &c. and other persons to the number of one hundred and more whose names are to the jurors unknown, on, &c. at, &c. being members of an association not established by law called the M Association, and X being a journeyman tailor and not a member thereof, and the said association requiring of its members the payment of certain moneys and compliance with certain rules, did then and there unlawfully and maliciously conspire, combine, confederate, and agree together to compel all journeymen tailors and especially said X to become members of said

[1] This extended averment of the conspiracy will in no way interfere with allegations here of overt acts, should the pleader elect to make them.

[2] Should the proof be, that the conspirators intended what is here alleged only on condition that X refused compliance with demands from persons having no authority to make them; as, for example, refused, to his employees or to third persons, to tender higher wages than he had before offered, or take into his service men whom he did not want, or turn off workmen whom he desired to retain; this circumstance would not create a variance. For a business man to transmute himself into a puppet, and be moved by the showman, is to abandon business. And he who is compelled to do this is forced out of business.

[3] Ante, § 301.

association, and to pay the moneys and conform to the rules aforesaid, and on his and their refusing the same to prevent him and them from thereafter carrying on the said trade and business, and to compel Y, who was then and there the employer of the said X, and all other employers of journeymen tailors, to turn off from their employ in the said trade and business the said X and all other such journeymen tailors not members as aforesaid, unless he and they would and did join the said association, and pay the moneys and conform to the rules aforesaid;[1] against the peace, &c.[2]

§ 306. **By Workmen to raise their Wages.** — It is not only lawful but commendable for workmen to seek by legitimate and honorable means to raise their wages, and to combine therefor; as, for example, by teaching one another improved methods of work so as to render their services more valuable, by opening the paths to other business for those of their number who choose to enter them so as to diminish competition, by assisting one another to remove to places where larger wages are paid, and by other appropriate devices. So that a simple allegation against them of conspiring to raise their wages charges no offence.[3] But it is criminal to conspire to do unlawful acts, and their purpose to accomplish the lawful end of raising their wages by such means does not take away the criminality; for the law does not, more than good morals, permit men to do a wrong in order to accomplish a good. The allegations should embody the facts to be proved; as, for example, —

That on, &c. at, &c. A, &c. B, &c. [and so on, setting out the names of as many as it is deemed best to make defendants], and one hundred and more other men whose respective names are to the jurors unknown, were journeymen hatters, working for wages at their said trade in the employment and service of X, who was then and there a manufacturer of hats; that the said X had then and there large orders for hats which he had contracted with sundry persons to manufacture and deliver at short and limited intervals for fixed and determined prices, all of which the said defendants then and

[1] The indictment may go on, if the pleader chooses, and specify the means to be used to compel employers to discharge non-association journeymen; as, for example, to require all association journeymen to withdraw at once and in a body from their employment, and forbid others to take their places; and to threaten, &c. according to the facts.

[2] In Commonwealth *v.* Hunt, 4 Met. 111, is the form of an indictment similar to this, which was adjudged inadequate. But the form here proposed is in various respects stronger. And where the facts to be proved admit of allegations yet stronger, it is certainly the prudent course to add them. See further as to the law, Crim. Law, II. § 233; The State *v.* Donaldson, 3 Vroom, 151.

[3] I have stated this question as in sound doctrine it appears to me. For more upon it, and the judicial utterances, see Crim. Law, II. § 230–233.

there well knew. Whereupon the said A and the said other defendants did then and there unlawfully, maliciously, and secretly conspire, combine, confederate, and agree together to injure, oppress, impoverish, and drive from his said business of manufacturing hats, the said X, and to prejudice and disappoint the several persons to whom the said X had promised as aforesaid to deliver manufactured hats, and to injure the community and its trade and commerce by creating disturbances in the manufacture and buying and selling of hats, to diminish the productive industry of the country by idleness, and to create danger that themselves and families would become paupers requiring public support, by suddenly and for no lawful purpose of otherwise supporting themselves withdrawing in a body from their said employment with the said X, by persuading, enticing, and inducing all other workmen in his said employment thus to withdraw, by remaining near his place of business, idling away their time, and seducing and inducing all other journeymen hatters whom the said X should seek to employ not to serve him, by refusing to go elsewhere in search of work, and by giving out that the said X should take them back into his said service at a rate of wages greatly above what they had theretofore received, or be crippled in his said business, ruined therein, and never more be permitted to carry it on; against the peace, &c.[1]

§ 307. **By Manufacturers to reduce Wages.** — Employers have the right to hire workmen at as low wages as they can; with the same limit as in the case of workmen seeking an increase of pay, that they must not resort to unlawful means. The form in the last section will indicate how the indictment should be.[2] Not often will there be occasion to bring such an indictment; because, by reason of their larger property at stake, it is more obvious to themselves than to the workmen how a wrongful act of this sort does a greater injury to the perpetrators than to the intended victims.

§ 308. **In General as to Labor Conspiracies.** — The foregoing are specimen forms of the indictment, good, it is believed, in most of our States, yet probably not in all. They are not servilely copied from the books; because most of the precedents in the books are too voluminous and verbose, or loosely drawn; or framed with reference to some statute local to England or to the particular State, or on a view of the law now exploded, or of doubtful capacity to resist objections which might be urged against them. But most of those in the books are referred to in the note, and

[1] See post, § 308 for references to other forms.

[2] And see the form in 3 Chit. Crim. Law, 1169.

they can be readily consulted and compared with the forms here proposed.[1]

§ 309. **To injure Public.** — The indictment for a conspiracy to the detriment of the public differs in little from that to inflict a private wrong, except in designating, in some appropriate terms, the public instead of an individual as the injured party.[2] For example, —

§ 310. **To enhance by False News the Price of Government Securities.** — The allegations, modified and adapted to our use from a famous English case, may be, —

That on, &c. at, &c. there being open and public war between the people and government of the United States of America and the king of, &c. and the prices of the bonds and other securities issued by the United States aforesaid being thereby greatly depressed, and it being by the purchasers and sellers thereof believed that on the coming of peace those prices would be greatly increased, A, &c. and B, &c. did then and there unlawfully and maliciously conspire, combine, confederate, and agree together to proclaim then and there and cause it to be believed that a great naval battle had lately been fought between the said two contending powers, wherein the forces and ships of the said king had been utterly defeated, overthrown, and destroyed, and the said king had been slain, and his successor and the advisers of the said crown had accepted proposed terms of peace, and peace was about to be proclaimed between the said two contending powers; whereas in truth and in fact no such battle had been fought, the said king had not been slain, and no terms of peace had been agreed to as aforesaid, and there was no prospect thereof, all of which the said A and B then and there well knew; with the intent of them the said A and B that persons might be then and there, before said false news could be contradicted,

[1] For various conspiracies among workmen to raise their wages, lessen their hours of labor, &c. see 3 Chit. Crim. Law, 1163, 1167; 4 Went. Pl. 103–105, 113–116, 120–124; 6 Ib. 375. To prevent workmen from continuing to work, Matthews Crim. Law, 453. Among workmen for employer taking an apprentice or workman contrary to their rules, 3 Chit. Crim. Law, 1166; 4 Went. Pl. 100–102. Employers conspiring against journeymen, 3 Chit. Crim. Law, 1169. More forms against workmen conspiring, by various means, to raise their wages, Reg. *v.* Rowlands, 2 Den. C. C. 364, 17 Q. B. 671, 5 Cox C. C. 436, 466; Reg. *v.* Duffield, 5 Cox C. C. 404; Rex *v.* Vipont, 2 Bur. 1163; Rex *v.* Hanson, 31 Howell St. Tr. 2; Rex *v.* Bykerdike, 1 Moody & R. 179. Among workmen to compel the employer to take back a discharged workman, Reg. *v.* Bunn, 12 Cox C. C. 316. To prevent the employer taking an apprentice, Rex *v.* Ferguson, 2 Stark. 489. To force workmen to leave employment, and employer to alter mode of carrying on business, Reg. *v.* Hibbert, 13 Cox C. C. 82; Reg. *v.* O'Connor, 5 Q. B. 16. Workmen conspiring to procure the discharge of a fellow-workman, People *v.* Trequier, 1 Wheeler Crim. Cas. 142. Members of a society not to work where non-members are employed, Commonwealth *v.* Hunt, 4 Met. 111. To raise wages, People *v.* Melvin, 2 Wheeler Crim. Cas. 262; People *v.* Fisher, 14 Wend. 9.

[2] Crim. Proced. II. § 243.

seduced and persuaded thereby to buy the bonds and securities which had been issued by the said United States at enhanced prices, and with the intent of them to defraud all such purchasers of the same; against the peace, &c.[1]

§ 311. **To adulterate Manufacture.** — The allegations may be, for example, —

That A, &c. and B, &c. on, &c. at, &c. devising and intending to acquire to themselves unlawful gains by means of a public fraud, did then and there unlawfully and maliciously conspire, combine, confederate, and agree together to mix and compound, in large quantities, genuine indigo of foreign growth and manufacture with starch, blue vitriol, nutgalls, alum, and a decoction of logwood [*or*, with certain worthless and deceptive ingredients to the jurors unknown; *or*, with blue vitriol, nutgalls, and other worthless and deceptive ingredients to the jurors unknown [2]], in such proportions and in such manner as to create a product three times greater in quantity and weight than such genuine indigo therein, resembling in form, color, and otherwise such genuine indigo of the best quality, with the intent to thrust the same into commerce, and to sell it, and cause it to be sold, bought, and used, as and for such genuine indigo of the best quality; against the peace, &c.[3]

§ 312. **Other Conspiracies.** — The differing ways of criminally conspiring are almost infinite. But the indictment is similar in all. No good, sufficient to compensate for the space occupied, would come from extending these forms into further instances. In the note,[4] references are given to places where others can be

[1] Rex *v.* De Berenger, 3 M. & S. 67. Form for conspiracy to raise the price of salt, 3 Chit. Crim. Law, 1164. To **Engross and Monopolize** an article of manufacture and commerce, Rex *v.* Crispe, Trem. P. C. 83.

[2] Great caution should be taken at this part of the indictment to avoid a variance. I am not certain that it is necessary to set out the ingredients or to say they are unknown. I should think the words might be "with such valueless and deceptive ingredients other than genuine indigo as would impart to the mixture the appearance of genuine indigo of foreign growth and manufacture." If there is doubt, the case will be a proper one for a second or third count.

[3] Commonwealth *v.* Judd, 2 Mass. 329, compared with Davis Prec. 105. **Public by False Pretences.** — For a form for cheating the public by false pretences, adjudged ill for being too vague and uncertain, see the Irish case of White *v.* Reg. 13 Cox C. C. 318.

[4] To prevent the burial of a dead body in order that it may be dissected. 2 Chit. Crim. Law, 36. By parish officers and others as to maintenance of paupers. 3 Chit. Crim. Law, 1157; 4 Went. Pl. 112, 124; 6 Ib. 398; 1 Cox C. C. App. 11. Among prisoners, to break prison, &c. and escape. 3 Chit. Crim. Law 1149, 1150; 4 Went. Pl. 116–118. In the nature of embracery. Rex *v.* Opie, 1 Saund. 300. In connection with holding to bail. 3 Chit. Crim. Law, 1169; Rex *v.* Sheers, 4 Went. Pl. 94. To dissuade a man from giving evidence against one for putting off bad money. 3 Chit. Crim. Law, 1151. To withdraw from a criminal prosecution and not appear against the prisoner. Reg. *v.* Hamp, 6 Cox C. C. 167. To destroy a warrant issued on a criminal charge. The

found; and occasionally the practitioner may desire to consult them. But no two cases are in all particulars identical, therefore the pleader should draw each indictment with special reference to the individual facts.

III. *Practical Suggestions.*

§ 313. **Importance of understanding Subject.** — The law of criminal conspiracy is, when rightly understood and administered, a beneficent corrective of wrongs which are not otherwise reached. It is less rigid in its workings than the law of most other offences, and more under the judicial control. It should be well understood by prosecuting officers, that they may judge wisely when to invoke it and when to forbear, and properly enlighten the courts when questions under it judicially arise. It is a great misfortune that in a few of our States no hint of this sort has been given and heeded. We have some decisions, not many, to expunge which from the books, were it possible, would be worth a subsidy. And there are cited in our courts text-books the authors of which had no manner of comprehension of this subject. If our prosecuting officers will explore it *for themselves*, and call into action their best energies and amplest learning

State *v.* Enloe, 4 Dev. & Bat. 373. To defeat justice by false evidence and suppression of facts on preliminary inquiry before magistrate. 5 Cox C. C. App. 9. To cause, by false personation, sheriff's officer to arrest wrong man. 3 Chit. Crim. Law, 1148. To defraud the government of revenue and otherwise. Rex *v.* Hedges, 28 Howell St. Tr. 1315; United States *v.* Walsh, 5 Dil. 58; United States *v.* Fehrenback, 2 Woods, 175; United States *v.* Crosby, 1 Hughes, 448; United States *v.* Dennee, 3 Woods, 47, 48; Reg. *v.* Thompson, 16 Q. B. 832, 5 Cox C. C. 166. To bring in foreign goods without payment of customs. Reg. *v.* Blake, 6 Q. B. 126. To obtain money by procuring the appointment of a person to an office in the customs. Rex *v.* Pollman, 2 Camp. 229. To defeat the operation of the laws against the sale of intoxicating liquor. The State *v.* Potter, 28 Iowa, 554; The State *v.* Harris, 38 Iowa, 242. Against the election laws. Commonwealth *v.* McHale, 1 Out. Pa. 397, 400, 407. To elect a legislator through bribery. 7 Cox C. C. App. 15. To procure false voting. Commonwealth *v.* English, 11 Philad. 439. To overturn the government and assist the enemies of the country. Rex *v.* Walker, 23 Howell St. Tr. 1055, 1078. To join the rebellion. Commonwealth *v.* Blackburn, 1 Duv. 4. To seduce artificers and carry away machines to foreign parts. 3 Chit. Crim. Law, 1161. By two, for one to rob the other, to charge the hundred. 3 Chit. Crim. Law, 1156. By parish officers, &c. to defraud sufferers by fire of money collected for their relief. 3 Chit. Crim. Law, 1188. To disturb dissenting congregation. 2 Chit. Crim. Law, 29. To enter upon land and expel the possessor. Wilson *v.* Commonwealth, 15 Norris, Pa. 56. To destroy or erase the indorsement on a promissory note. The State *v.* Norton, 3 Zab. 33. Against Warren Hastings. Rex *v.* Fowke, 20 Howell St. Tr. 1077, 1143. To keep a witness from attending court. Rex *v.* Steventon, 2 East, 362.

whenever questions under this title arise, erroneous *dicta*, and to some extent erroneous decisions, may be corrected ; and the retrograde, where it appears, be stopped.

§ 314. **Undue Accumulations of Wealth, and Labor Conspiracies.** — One of the most momentous questions, as viewed from the stand-point of political economy, ever presented to any country, is becoming prominent with us, in connection with that twin-evil, always and everywhere one and inseparable, enormous accumulations of wealth in single hands and labor strikes. These are the upper and nether millstones between which the middling interests are crushed, and the poor are ground to powder. The power which rolls undue wealth into the embrace of scheming, long-headed speculators and gamblers in the securities and products of the people and government, consists of the upheavals of commerce, of trade, of manufacture, and of the agricultural industries, and of the throbs of public and private woe. It was little known with us until it became terrible in the turmoil and struggle of a great civil war, and was continued by the unrest produced largely by great labor strikes and the apprehensions of their coming. And the poor and the working people are kept from rising to the middle ranks by bestowing their surplus earnings on "Unions," and spending them in the idleness enforced by strikes. Yet thus they feed the streams of wealth which flow to those whom, more than any others, they are ostensibly meant to injure, — the holders of ill-acquired millions, the real and only recipients of whatever benefits they in truth bestow. The fact which mitigates this evil is their small success and many failures. Nearly the entire population, in every country truly civilized, consists of people who at one occupation or another labor with their hands. To the few whose wealth exempts them, it is immaterial whether they pay more or less for such products of labor as they use. The poor laborers constitute the bulk of consumers. And if one class obtains by forced means an increase of the rewards of labor, the burden is simply cast on another class ; who, as the cost of living is enhanced, may well demand higher pay. When the equilibrium is again reached, no one is better off than before. But the cost of production has become so high that exports stop. Money goes abroad, nothing else. Universal stagnation follows ; men who have the means of paying artisans and laborers will not hire them. With the domestic ruin, the

tide of emigration turns and flows back to foreign lands, and this country ceases to be an asylum for the poor and a refuge for the oppressed. Now, —

§ 315. **As to Remedy.** — One of the means resorted to for the correction of this evil consists of indictments against the conspirators. When such a prosecution can be so conducted as to enlighten the classes of people who engage in these conspiracies, so that they will see how much harm they are doing to themselves, good may come from it. But ordinarily it cannot be so conducted. Where the immediate attempt of the conspirators is to drive away or otherwise prejudice one of their own class who is too intelligent to join them in the evil combination, every power of the government should be put forth for his protection. And there may be other labor conspiracies within this principle. In nothing is the prosecuting officer called upon for the exercise of higher wisdom than in dealing with questions of this sort.

CHAPTER XXIV.

CONTEMPT OF COURT AND THE LIKE.[1]

§ 316. **How Chapter divided.** — We shall consider, I. The Summary Proceeding; II. The Indictment for disobeying Judicial Orders; III. The Indictment for other Contempts.

I. *The Summary Proceeding.*

§ 317. **In General.** — This proceeding, while treated in most cases as criminal, is resorted to and conducted the same in civil causes and before civil courts as in criminal.[2] Having various and diverse objects, in circumstances widely dissimilar, it assumes many aspects, admitting of or requiring a good deal of variety in its steps and forms; moreover, conforming to the general practice in the particular tribunal, and this differing in our States, and in some of the States being more or less governed by direct statutory provisions, the varieties from locality become considerable. Therefore it is not deemed best, in these directions meant for use in all the States, to enter at large into this subject. But a reference to some cases in which forms appear,[3] and a few particular explanations, with forms, will be helpful.

[1] For the direct discussions of the subject of this title, see Crim. Law, II. § 241–273. Collateral, Ib. I. § 240, 913, 1067; Crim. Proced. I. § 869; Stat. Crimes, § 137. And see titles LIBEL AND SLANDER — OBSTRUCTIONS OF JUSTICE AND GOVERNMENT, &c.

[2] Crim. Law, II. § 241, 269; Cartwright's Case, 114 Mass. 230, 238, 239; In re Rhodes, 65 N. C. 518; Morris *v.* Whitehead, 65 N. C. 637; In re Murphey, 39 Wis. 286; Phillips *v.* Welch, 12 Nev. 158. See Middlebrook *v.* The State, 43 Conn. 257; Phillips *v.* Welch, 11 Nev. 187.

[3] People *v.* Nevins, 1 Hill, N. Y. 154; People *v.* Wilson, 64 Ill. 195; Worland *v.*

§ 318. **Not in Presence of Court — Attachment.** — Where the contempt is committed elsewhere than in the presence of the court, notice of the proceeding must in some way be given to the party; followed, of course, by the opportunity to be heard. This is commonly, but not necessarily in all cases, done by an attachment; preceded or not, according to the circumstances of the case, by a rule to show cause why it should not issue.[1] A form of the attachment in the English books, easily modified to the practice of any particular State, is, —

To the Sheriff of, &c. Greeting: We command you that you do not forbear by reason of any liberty in your bailiwick, but that you attach A, B, C, and D, so that you may have them before us [that is, stating the court; this was the form for the King's Bench] at W, on, &c. to answer to us for certain trespasses and contempts brought against them in our court before us, and have you then and there this writ. Witness, &c. at, &c. By the court.[2]

§ 319. **In Presence of Court.** — It is not necessary to bring into court, by process, a party already there,[3] or adduce to a judge proof of what he sees. Therefore, for a contempt in the presence of the tribunal, it may verbally order the attending officer to take the offender into custody; and, without warrant of arrest, written accusation, or other formal steps, render its sentence against him for the contempt, such as to pay a fine or suffer imprisonment, and in the former case stand committed until the fine is paid.[4] Nor can the offender oust the court of its power thus to proceed by leaving the court-room before he is actually seized.[5]

§ 320. **Commitment.** — Where the offender is ordered to be imprisoned out of the presence of the court, there must be a warrant or commitment therefor in writing.[6]

The State, 82 Ind. 49, 50; Gandy *v.* The State, 13 Neb. 445; Rex *v.* Beardmore, 2 Bur. 792; Cartwright's Case, 114 Mass. 230; Neel *v.* The State, 4 Eng. 259.

[1] The State *v.* Sheriff, 1 Mill, 145, 152; Ex parte Kilgore, 3 Texas Ap. 247; The State *v.* Blackwell, 10 S. C. 35; Geisse *v.* Beall, 5 Wis. 224; People *v.* Brower, 4 Paige, 405; In re Pollard, Law Rep. 2 P. C. 106; Reg. *v.* Castro, Law Rep. 9 Q. B. 219.

[2] 2 Gude Crown Pract. 151; 4 Chit. Crim. Law, 362. See Robbins *v.* Gorham, 25 N. Y. 588; People *v.* Pearson, 3 Scam. 270.

[3] Crim. Proced. I. § 179.

[4] 4 Bl. Com. 286; Ex parte Pater, 5 B. & S. 299; Holcomb *v.* Coonish, 8 Conn. 375, 379; The State *v.* Matthews, 37 N. H. 450; Spilsbury *v.* Micklethwaite, 1 Taunt. 147; Watt *v.* Ligertwood, Law Rep. 2 H. L. Se. 361; Phillips *v.* Welch, 12 Nev. 158; Rex *v.* Leech, 9 Howell St. Tr. 351.

[5] Middlebrook *v.* The State, 43 Conn. 257; Watt *v.* Ligertwood, supra. See Crim. Proced. I. § 178; In re Pollard, Law Rep. 2 P. C. 106.

[6] 2 Hawk. P. C. c. 16, § 13; Furlong *v.*

§ 321. **For Refusing to Testify.** — The following is an English form of commitment of a witness by a magistrate for refusing to testify. It should be adjusted to the practice of the particular State, — not done here, because the practice in the several States differs: —

To the Keeper of New Prison at, &c. or his Deputy.[1]

Middlesex, to wit. Receive into your custody the body of A herewith sent you, brought before me M, one of her Majesty's justices of the peace in and for the said county, by X, upon whose information taken upon oath before me it appears that a certain felony hath been committed, touching which the said A can give material evidence, and the said A admitting on his examination that he knows the name and residence of the person suspected to have committed the said felony, but refusing to answer touching the same, or to disclose the name and residence of the said person, him the said A therefore safely keep in your said custody until he shall submit to be examined touching the said felony,[2] and for so doing this shall be your sufficient warrant.

Given under my hand and seal this, &c.

M (L. S.).[3]

II. *The Indictment for disobeying Judicial Orders.*[4]

§ 322. **Practically Unimportant.** — While this offence is probably cognizable by the common law of our States in general, we have no reports of indictments for it, except an occasional statutory one.[5] In like manner, in England, it appears to extend practically only to disobedience to orders of magistrates in sessions or otherwise; though, in point of law, it would appear not to be so limited.[6] Hence, —

Bray, 2 Saund. 182, 1 Mod. 272; Mayhew *v.* Locke, 7 Taunt. 63; Ex parte Maulsby, 13 Md. 625; Ex parte Cohen, 6 Cal. 318. And see People *v.* Pirfenbrink, 96 Ill. 68. See Wilson's Case, 7 Q. B. 984, 1000.

[1] "In strictness it should be directed to a constable, and to the jailer or keeper of the prison, requiring the former to convey the prisoner into the custody of the jailer, and the latter to receive and keep him; but, in the police districts of London and Dublin metropolis respectively, it is usually directed to the jailer only." 2 Gab. Crim. Law, 177.

[2] Chitty suggests the query whether it would not be better to add, "or shall be discharged by due course of law."

[3] 4 Chit. Crim. Law, 37. And for other like forms see same page and page 38. I cannot safely say how much of this is surplusage. Evidently less particularity would be required in a commitment for a like offence by a superior court. And see People *v.* Turner, 1 Cal. 188; Ex parte McKee, 18 Misso. 599; Burnham *v.* Morrissey, 14 Gray, 226; In re Morton, 10 Mich. 208; Ex parte Rowe, 7 Cal. 175; De Witt *v.* Dennis, 30 How. Pr. 131; Ex parte Summers, 5 Ire. 149. For a form of conviction of a witness before the grand jury for refusing to answer questions, see People *v.* Kelly, 24 N. Y. 74.

[4] Crim. Law, I. § 240.

[5] Ante, § 159; Crim. Law, I. § 240.

[6] In Reg. *v.* Ferrall, 2 Den. C. C. 51,

§ 323. **Form of Indictment.** — It will serve all practical purposes simply to present one form of the indictment from the English books; namely, —

That, at the general quarter sessions of the peace of our Lady the Queen, holden for the county of Middlesex, at the New Sessions House on Clerkenwell Green, in and for the county aforesaid, by adjournment, to wit, on, &c. before M, N, O, and P, esquires, and others their fellows, justices, &c. it was ordered by the same justices and court there, that, &c. [proceeding to state the order of sessions in the past tense [1]], [as by the said order, reference being thereunto had, will more fully and at large appear [2]]; of which said order the said A, one of the high constables in the order aforesaid named, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, had notice. Nevertheless, the said A, late of the parish aforesaid, in the county aforesaid, gentleman, then being one of the high constables in the order aforesaid mentioned, unlawfully and contemptuously, upon being served with the said order, did neglect and refuse to, &c. [here insert what the order required of him], as by the said order he the said A was required to do; nor hath he the said A at any time since complied with the said order, although often requested so to do; [in contempt of our Lady the Queen and her laws, to the evil example of other persons in the like case offending, and [3]] against the peace, &c.[4]

54, 56, Pollock, C. B., after distinguishing "between a non-payment of money and a refusal to do some act, such as being sworn in as a constable, or doing some other act of a public nature," intimates that, on principle, disobedience to an order simply to pay money should not be held indictable. Still he says: "The authorities are clear upon the point, that an indictment will lie for a refusal to comply with an order of justices for the payment of money; and, although I individually should not be disposed to hold, for the first time, that such a refusal was indictable *since a like refusal to comply with an order of a superior court is not so*, yet I feel bound by the authorities to concur with the rest of the court in this view of the law." But is it true that, by the English common law, a like order from a superior court, attended by the like circumstances, would not come under the same rule? I have read the English cases pretty thoroughly, yet I may have overlooked something; but I can recall no decision to the proposition that disobedience to a judicial order from the higher courts is not indictable in circumstances wherein the like disobedience to a judicial order from a magistrate would be. Stephen, in his "Digest," puts the doctrine, it seems to me with admirable precision; thus, — "Every one commits a misdemeanor who disobeys any order, warrant, or command duly made, issued, or given by any court, officer, or person acting in any public capacity, and duly authorized in that behalf, unless [here comes the important qualification, explaining why this doctrine is not more widely acted upon] any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience." Steph. Dig. Crim. Law, 83.

[1] See also, as to the setting out of the order, Rex *v.* Boys, Say. 143.

[2] Doubtless not necessary. It is omitted from the 19th and I presume other late editions of Archbold.

[3] Unnecessary. Ante, § 48; Crim. Proced. I. § 647.

[4] Archb. Crim. Pl. & Ev. 10th ed. 584, 19th ed. 894. For other forms see 2 Chit. Crim. Law, 283, 284, 287, 291; 4 Went. Pl. 229; Rex *v.* Winship, Cald. 72, 5 Bur. 2677; Rex *v.* Robinson, 2 Bur. 799; Rex *v.* Mytton, 4 Doug. 333; Rex *v.* Moorhouse, 4 Doug. 388, Cald. 554; Rex

III. *The Indictment for other Contempts.*[1]

§ 324. **Elsewhere — Here.** — Most of the offences which are indictable contempts of court are known also by some other name; as, for example, assault and battery, when committed in the judicial presence; libel and oral slander, under circumstances to be such contempt; and many of the offences for which forms will be given under the title "Obstructions of Justice and Government" are also[2] contempts of court. The pleader, therefore, should consult other titles analogous to this for forms which would be equally appropriate here.

§ 325. **Formula.** — This offence is committed in such a variety of ways and circumstances as to render it impossible to suggest any one set of allegations which will be adapted to all cases. The following incomplete formula may be in some degree helpful: —

That A, &c. [ante, § 74–77] on, &c. at, &c. [ante, § 80], being personally then and there in presence of the court of, &c. which was then and there open and in the transaction of business, did, &c. [say what] whereby [for example] the business of said court was interrupted and disturbed, and the Honorable X, judge of the said court, who was then and there presiding therein, was insulted and maliciously defamed [*or* set out any transaction in the absence of the court amounting to an indictable contempt]; against the peace, &c. [ante, § 66].[3]

v. Kingston, 8 East, 41; Rex *v.* Gilkes, 3 Car. & P. 52; Reg. *v.* Thornton, 2 Cox C. C. 493. More particularly, order for maintenance of bastard child, 2 Chit. Crim. Law, 281; 4 Went. Pl. 227; Reg. *v.* Brisby, 1 Den. C. C. 416, 418, 2 Car. & K. 962; Reg. *v.* Ferrall, 2 Den. C. C. 51, 4 Cox C. C. 431. To pay costs of appeal, Reg. *v.* Orr, 12 U. C. Q. B. 57. To work on highway, Rex *v.* Boyall, 2 Bur. 832. To make provision for the poor (against overseers), Rex *v.* Fearnley, 1 T. R. 316. To pay church-rate, Reg. *v.* Bidwell, 1 Den. C. C. 222, 2 Car. & K. 564, 2 Cox C. C. 298. To admit a person to a benefit society, Rex *v.* Gilkes, 8 B. & C. 439. To restore lands, Reg. *v.* Sewell, 8 Q. B. 161; Reg. *v.* Wilson, 1 Cox C. C. 255. To produce a will of a deceased person, The State *v.* Pace, 9 Rich. 355.

[1] Crim. Law, II. § 264–267, 273.

[2] Ib. I. § 465-469; II. § 265.

[3] For forms see other titles, particularly "Libel and Slander" and "Obstructions of Justice and Government;" also 2 Chit. Crim. Law, 149, 235; Rex *v.* Barbone, Trem. P. C. 73; Rex *v.* Vavasour, Trem. P. C. 79; Rex *v.* Forth, Trem. P. C. 80; Rex *v.* Harrison, 3 Howell St. Tr. 1369; Rex *v.* Barnardiston, 9 Howell St. Tr. 1333; Rex *v.* Griffith, Vern. & S. 612.

Arkansas. — Wilson *v.* The State, 5 Pike, 513.

Massachusetts. — Commonwealth *v.* Reynolds, 14 Gray, 87.

Vermont. — The State *v.* Carpenter, 20 Vt. 9.

Virginia. — Commonwealth *v.* Feely, 2 Va. Cas. 1.

§ 326. **Words spoken to Judge in Open Court.** — Reducing an old and voluminous form to modern proportions, we have, —

That on, &c. at, &c. the Court of Common Pleas there was open for and occupied in the transaction of the business thereof, and the Honorable X, one of the judges thereof, was therein judicially sitting and presiding; whereupon A, &c. wilfully, wickedly, and maliciously, presenting himself at the bar of said court, and not in the discharge of any duty, did then and there proclaim and declare, in the presence and hearing of the said Honorable X, and of the jurors, witnesses, counsellors at law, and a large concourse of people there assembled and attending on said court, and to the disturbance and scandal thereof and of the said Honorable X, the words following, to wit, "You," meaning the said Honorable X, "are a traitor to your country, and I will have you impeached and turned out of your judicial seat, and hung;" against the peace, &c.[1]

§ 327. **Threat made to induce Relinquishment of Verdict.** — One of Chitty's forms is against an attorney at law, who, appearing in a cause for the plaintiff, and having a verdict rendered against him on the testimony of the defendant's son, wrote to the defendant's attorney threatening to prosecute the son for perjury unless he would relinquish all benefit from the verdict. Altered for use with us, it is, —

That at a court of, &c. holden on, &c. at, &c. there came on in due form of law for trial before a jury a certain cause within the jurisdiction of said court, wherein one X was plaintiff, one Y was defendant, and one M appeared as attorney for the said Y; and one Z, a son of the said Y, testified therein on his oath duly administered as a witness for the said Y his father; whereupon the said jury rendered, in due form of law, their verdict in favor of the said Y.[2] And afterward, on, &c. at, &c. A. &c. who was the attorney of the said X at the trial of said cause, maliciously and unlawfully devising to obstruct the course of justice in said court and cause, and by wrongful means and unlawful threats to prevent the said verdict from being carried into execution, wrote to the said M, still being the attorney of the said Y in said cause, a letter in the words following, to wit [setting out the letter by its tenor, with the innuendoes necessary to explain its meaning], with the intent thereby to extort and procure from the said Y, through the wish of him the said Y to prevent, and for the purpose of preventing, the said threatened prosecution of the said Z, a relinquishment of all benefit from the said verdict; against the peace, &c.[3]

[1] Rex *v.* Harrison, 3 Howell St. Tr. 1369. For other forms see Archb. Crim. Pl. & Ev. 19th ed. 899; Rex *v.* Griffith, Vern. & S. 612; Crim. Proced. II. § 807.

[2] Consult, as to the form thus far, the discussions in the chapter beginning ante, § 91.

[3] 2 Chit. Crim. Law, 149.

§ 328. **To prevent Witness appearing.** — The adjudications are not sufficiently numerous to enable one to say, on authority, to exactly how small proportions the indictment for this offence may be reduced. The following is in substance a form held, on careful consideration, to be good; it is shorter than Chitty's, which it resembles,[1] yet pretty plainly it admits of further abridgment: —

That heretofore, on, &c. N, a deputy sheriff of the county of O [duly authorized and legally qualified to perform the duties of said office[2]], by virtue of a warrant directed to him, and issued in due course of law, by M, esquire, a justice of the peace within and for the county of O, did [at, &c.[3]] summon and give notice to one X to appear before the Police Court of the city of, &c. when and where the complaint hereinafter stated should come on for trial, to give evidence of what he the said X knew relating to the matter of a certain complaint of P, it being within the jurisdiction of said court, charging that A, &c. [the defendant], did theretofore, on, &c. at, &c. in said county, in and upon the body of one P make an assault;[4] whereupon the said A, on, &c. at, &c. did, well knowing the premises, and devising to obstruct the course of justice in the said Police Court, wilfully, unlawfully, designedly, and unjustly, hinder and prevent the said X from appearing [and the said X did not appear[5]] before the said Police Court when and where the said A was had for trial on the aforesaid complaint, in obedience to the aforesaid notice and summons, to give evidence of what he knew relating to the matter of the said complaint [by then[6] and there

[1] 2 Chit. Crim. Law, 235.

[2] There is no ground for deeming this allegation necessary. In point of law, it is immaterial whether the officer was "legally qualified," or was merely an officer *de facto*. Crim. Law, I. § 464. And the court judicially knows the powers of a deputy sheriff. If there were two classes of officers of the same name, and only those of the one class were legally competent to do this service, there should be an averment bringing the particular officer within the authorized class.

[3] This was not in the form before me, and the court held it not to be necessary. Possibly some pleader may choose to insert it.

[4] A review of the principles stated in the chapter beginning ante, § 91, may assist the practitioner in determining how this part of the indictment should be. If I were to express my individual opinion, I should say that the following is sufficient in law, and practically better than the elaborate setting out in the text: —

That on, &c. at, &c. one X having been in due form of law summoned to appear before the Police Court of, &c. to give evidence of what he knew of the matter of a complaint then pending in said court, and within its jurisdiction, wherein P complained that theretofore in said county, on a day named, A, &c. committed an assault on him the said P [all of which is inducement, and so properly averred in this indirect and brief form. Then proceed]; the said A did then and there, well knowing the premises, &c. [setting out the offence].

The information in Commonwealth *v.* Feely, 2 Va. Cas. 1, which was adjudged good, contains but little more than is thus suggested.

[5] This is not necessary, because such fact is not essential to the constitution of the offence. Crim. Law, I. § 468. Still its insertion may be practically well if the matter within the next brackets is omitted. It is not at this place in the form before me.

[6] If the matter between these brackets is important, it is rendered nugatory and

threatening to cause the said X to be arrested and imprisoned if he appeared before said Police Court as he was then and there summoned, notified, and required by law to do; and that by the threatening of the said A as aforesaid, the said X was then and there hindered, dissuaded and prevented from appearing, and did not appear, before said Police Court, when and where the said A was had for trial before said Police Court on said complaint, then and there to give evidence of what he the said X knew relating to the matter of said complaint [1]]; against the peace, &c.[2]

§ 329. **Practically,** — in most cases of contempt of court, the proceeding will be the summary one explained in the first subtitle. But circumstances not unfrequently occur wherein the indictment is both the more judicious and the more effectual remedy. With the help afforded here and in other titles of this volume, the practitioner will readily devise all needed forms.

the indictment bad by the use of "then" in this place to denote the time; provided that, as in the form before me, the pleader inserts different days where I have used the &c. It so becomes uncertain to which one of the days the "then" refers. Crim. Proced. I. § 414. This defect seems to have been overlooked by counsel.

[1] I cannot think that any of the matter in these brackets is essential, especially if that in the last preceding brackets is inserted; because a complete offence has already been set out, and with sufficient minuteness. In Commonwealth *v.* Feely, supra, this part of the indictment is, —

"That he the said John Feely did use means to prevent, and did then and there prevent, one Samuel Wright from attending as a witness to give evidence to prove the execution of a deed of trust, which deed of trust was executed by the said John Feely to John Draper."

[2] Commonwealth *v.* Reynolds, 14 Gray, 87. For a form for endeavoring to prevent a witness from appearing and testifying before a grand jury, see The State *v.* Carpenter, 20 Vt. 9. **Against Witness,** — for not testifying before grand jury. Batre *v.* The State, 18 Ala. 119.

For CONVEYANCES, FRAUDULENT, see FRAUDULENT CONVEYANCES.
CORRUPTION IN ELECTIONS, see ELECTION OFFENCES.
COUNSELLING, see ante, § 105, 106, 114–117, 119–121.
COUNTERFEIT MONEY, see, besides the next chapter, FORGERY.

CHAPTER XXV.

COUNTERFEITING AND THE LIKE AS TO COIN.[1]

§ 330. **Elsewhere.** — The substantial parts of the indictment for various offences against the coin are given in the chapter in "Criminal Procedure," reducing the necessity for multiplying forms in the present connection.

§ 331. **Under Common Law — (Uttering).** — All indictments in the United States courts are statutory; and, for reasons explained in other volumes of this series, the practitioner will seldom or never have occasion to draw an indictment for any offence against the coin under the common law of his State.[2] In England, also, where doubtless some of the common law of these offences remains, the judicial reports contain few or no modern cases upon it, and even the current books of practice furnish no common-law forms for the indictment. But Chitty has four forms, severally for the common-law misdemeanor of fraudulent uttering, one of which is, —

That A, &c. [being an evil-disposed person[3]], on, &c. at, &c. did unlawfully and deceitfully, with intent to defraud one X, utter and expose [and cause and procure to be uttered and exposed[4]] to the said X nine pieces of gold, for and as good and true guineas of the proper money of this realm [*with us*, gold coins of the proper money of the United States of America], notwithstanding none of the said nine pieces of gold, at the said time when they were so uttered and exposed [and caused and procured to be uttered and exposed[5]], were good and true guineas of the proper money of this realm

[1] For the direct discussions of this offence, including the pleading, practice, and evidence, see Crim. Law, II. § 274–300; Crim. Proced. II. § 246–271. Collateral, Crim. Law, I. § 178, 204, 359, 412, 479, 686, 765, 769, 799, 988; II. § 607; Crim. Proced. I. § 529, 636, 1126, 1127; Stat. Crimes, § 214, 225, 306–308, 319. And compare with the title FORGERY, &c.

[2] Crim. Law, I. § 178, 194, 198, 199, 479, 988; II. § 279, 281, 284–287; Crim. Proced. II. § 248, 265.

[3] Unnecessary. Ante, § 46.

[4] A needless supplement to the clause next preceding. Ante, § 139 and note, and the places there referred to.

[5] Useless, as see last note.

[*with us*, gold coins of the proper money of the United States of America], but each of them had been unlawfully filed and by such filing diminished and rendered defective in their weight, which before such filing they had, being before such filing good and true guineas [gold coins] of the proper money of this realm [the said United States]; he, the said A, at the time he so uttered and exposed [and caused and procured to be uttered and exposed [1]] the said nine pieces of gold as aforesaid, then and there well knowing that none of them were good and true guineas [gold coins of the said United States], but that each of them had been so as aforesaid filed, diminished, and rendered defective in their weight; [to the evil example, &c.[2] and] against the peace, &c.[3]

§ 332. **On Statute.** — The indictment on a statute must follow the same rules as other statutory indictments. Viewing together the State and United States enactments, they are so diverse that no one formula can profitably be given for all. Hence, classifying them, —

§ 333. **Counterfeiting.** — On a statute, State or National, in the terms of that of the United States,[4] the allegations may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80, 89], did falsely and feloniously make, forge, and counterfeit [5] ten [6] pieces of [false, forged, and counterfeit [7]] coin, each in resemblance and similitude of a gold coin of

[1] Needless, as see above.

[2] Needless. Ante, § 48.

[3] 2 Chit. Crim. Law, 116. These averments are uselessly verbose. The pleader, if he chooses, can reduce them to one half their words without omitting anything. Chitty's other three common-law forms are for uttering a counterfeit half guinea, p. 116; for uttering a counterfeit sixpence, while another is found in the utterer's custody, p. 117; and for selling counterfeit Dutch guilders as good, p. 119. They are substantially like the one in the text.

[4] R. S. of U. S. § 5457.

[5] These are the words of the indictment in United States *v.* Gardner, 10 Pet. 618. The words of the present English enactment are "falsely make or counterfeit any coin resembling," &c. 24 & 25 Vict. c. 99, § 2. This expression is simple and sufficient. But the terms of our national legislation are needlessly prolix; thus, — "falsely makes, forges, or counterfeits, or causes or procures to be falsely made, forged, or counterfeited, or willingly aids or assists in falsely making, forging, or counterfeiting any coin or bars in resemblance," &c. R. S. of U. S. § 5457. All this means nothing more than the simpler English expression, and few pleaders will deem it wise to cover the latter alternatives here quoted. Ante, § 139 and note, and the places there referred to. It might not practically be as well to use the still simpler expression "did falsely and feloniously counterfeit;" because, in some circumstances, it might be contended for the defendant that, though he "falsely made" the coin, he did not "counterfeit" it; thus opening the door to a useless discussion which the writing of two words would avoid.

[6] A variance between allegation and proof in the number of pieces will work no harm. Crim. Proced. II § 252 (I § 488 *b*, 579); Archb. Crim. Pl. & Ev. 19th ed. 804.

[7] The words in these brackets, or a part of them, are in the forms commonly used. And though the expression *counterfeited* a *counterfeit* coin seems inaccurate, it has

the coinage of the United States of America [1] called a half-eagle [2] [*or*, of a foreign silver coin, to wit, a silver coin of Spain, called, &c. by law then [3] current in the said United States, *or* then in actual use and circulating as money within the said United States]; against the peace, &c. [ante, § 66–69].[4]

§ 334. **Same on Different Statute.** — The indictment on a statute differently expressed will vary with its terms. Under the simpler phrase "counterfeits any gold or silver coin current by law or usage within this State," [5] the allegations may be, —

That A, &c. on, &c. at, &c. did fraudulently and feloniously [6] counterfeit ten pieces of the gold coin of the United States of America [current by law and usage within this State [7]], one piece whereof is called an eagle, two pieces whereof are called half-eagles, and seven pieces whereof are called quarter-eagles; against the peace, &c.[8]

been adjudged legally good. Crim. Proced. II. § 253. Still as the adjectives "false, forged, and counterfeit" are not found in this place in the statute, I see no reason why they should be put into the indictment.

[1] The words of the United States statute are, at this place, "in resemblance or similitude of the gold or silver coins or bars which have been or hereafter may be coined or stamped at the mints and assay offices of the United States." If from the allegation in the text we omit the words "of the coinage," it will probably remain sufficient, but I should prefer to retain them. Various other methods of covering this statutory expression have been devised. I have given what seems to me the best.

[2] Or, "five-dollar piece," as the pleader prefers. In designating the coin, it is practically best to use the statutory name, though perhaps the indictment would not always be ill if a common name not in the statute was employed instead. For the statutory names of our American coins, whether of gold, silver, copper, or nickel, see R. S. of U. S. § 3511, 3513, 3515. A variance between allegation and proof, in the name of the coin, is fatal. Crim. Proced. II. § 252, compared with Ib. I. § 488.

[3] In United States *v.* Gardner, supra, the expression is "which by law was then and still is made current in the United States of America." I see no propriety in thus alleging that the coin remains at the time of the indictment current with us. It need not so remain in point of law; or, were this material, the former condition of things is presumed to continue; or, again, the court judicially knows how the law is on this subject, the same as on every other.

[4] For forms see Archb. Crim. Pl. & Ev. 19th ed. 804; 2 Chit. Crim. Law, 103–108; Rex *v.* J. C. Trem. P. C. 227; Rex *v.* Harris, 1 Leach, 4th ed. 135; Rex *v.* Scott, 1 Leach, 4th ed. 401 (against principal and accessory before the fact); Crim. Proced. II. § 249, 251.

Arkansas. — Bell *v.* The State, 5 Eng. 536.

Connecticut. — The State *v.* Stutson, Kirby, 52.

Vermont. — The State *v.* Griffin, 18 Vt. 198.

United States. — United States *v.* Gardner, 10 Pet. 618.

[5] Mass. Pub. Stats. c. 204, § 14.

[6] To be used only in a State where the offence is felony.

[7] These words appropriately bring the case within the statutory terms. Yet where, as in this particular form, the court can see that the pieces are current by law, I do not deem it necessary to aver that they are. Ante, § 175, 182 and note, 187 and note, 214, 255.

[8] Compare with forms in Davis Prec. 131, and Train & H. Prec. 229. In these forms, to copy from the former, the coin counterfeited is described as "a certain piece of silver coin, current within this Commonwealth by the laws and usages thereof, called a dollar." In the text I have used greater particularity of descrip-

§ 335. **Impairing, &c.** — In varying statutory terms one is made punishable "who," to copy from the United States statute, "fraudulently, by any art, way, or means, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens the gold and silver coins which have been, or which may hereafter be, coined at the mints of the United States," &c.[1] On a provision in these words the allegations may be, for example, —

That A, &c. on, &c, at, &c. did feloniously and fraudulently lighten one piece of the gold coin of the coinage of[2] the United States of America called an eagle, by abstracting from the surface thereof [*or* inner parts thereof], [by means to the jurors unknown[3]], one tenth[4] part of the gold thereof, with intent to pass the said coin so lightened, and cause it to circulate, as and for a gold eagle of the standard weight; against the peace, &c.[5]

tion (Crim. Proced. I. § 568) as better in accord with ordinary good pleading. Still I do not intend to intimate any doubt of the sufficiency of the other method.

[1] R. S. of U. S. § 5459.

[2] See ante, § 333 and note.

[3] Probably, as the terms of the statute are "by *any* means," this clause in the indictment is not necessary. Ante, § 334, note.

[4] A variance as to the quantity removed would work no injury. Crim. Proced. I. § 488 *b*.

[5] We have not sufficient decisions to enable one to say how, upon authority, the indictment should be. Yet I cannot doubt the sufficiency of the form in the text. Our federal statute is a sort of copying and improving of the English 5 Eliz. c. 11, § 2, and 18 Eliz. c. 1, § 1. By the former, the "clipping, washing, rounding, or filing, for wicked lucre or gain's sake, of," &c. was made treason, and by the latter any one was declared a traitor who "shall, for wicked lucre or gain's sake, by any art, ways, or means whatsoever, impair, diminish, falsify, scale, or lighten the proper moneys or coins of this realm," &c. On the former, Chitty's (2 Chit. Crim. Law, 110) form for the indictment is, —

That A, &c. on, &c. at, &c. thirty pieces of gold called guineas, and three hundred pieces of silver called sixpences, of the proper moneys and coins of this realm, for wicked lucre and gain's sake falsely, feloniously, and traitorously clipped and filed, so that by means of the clipping and filing aforesaid every one of the said pieces of gold was greatly diminished in the weight of which it ought by law to have been, and thereby became and was greatly lessened in value, to wit, to the amount of two shillings each, and the said pieces of silver were also thereby then and there greatly diminished in the weight of which they ought by law to have been, and thereby became and were greatly lessened in value, to wit, to the amount of one penny each, and the same moneys so clipped and filed as aforesaid the said A, on, &c. at, &c. aforesaid, falsely, feloniously, and traitorously did expose and utter; against the peace, &c.

The only form I have been able to find in our books on the American statute is the one originally published in Davis Prec. 138, —

That A, &c. on, &c. at, &c. did unlawfully, fraudulently, and [for gain's sake, *unnecessary*, these words not being in our statute] impair, diminish, falsify, scale, and lighten certain pieces, to wit, ten pieces of gold coin called eagles, which had been coined at the mint of the United States [*or*, ten pieces of foreign gold coin, which were by the laws of the United States made current, and were in actual use and circulation as money within the United States], with intent to defraud some person to the jurors unknown; against the peace, &c.

I do not propose to raise a question as to the sufficiency of this form. The one in the text better accords with my ideas of the precision and individualization of things proper to be employed in criminal pleading.

§ 336. **Gilding, Coloring, &c.,** — to make an inferior substance pass for a gold or silver coin, are offences less common with us, and no form for the indictment need here be given.[1] This is a counterfeiting of the coin, and no separate statute against it seems to be required.

§ 337. **Uttering, &c.**[2] — The offence against the coin oftenest prosecuted in our courts is the criminal uttering or passing of counterfeits. The pleader should carefully note the terms of the particular statute, and especially its meaning under interpretation, and so frame his allegations as duly to cover the latter.[3] We have seen what is the simple form in use under the not-complicated English enactment.[4] A form which will be suggestive, while embracing somewhat more than most of our statutes require, is the following: —

That A, &c. on, &c. at, &c. did feloniously,[5] falsely, and deceitfully, with intent to defraud one X, utter and pass off [use the statutory words] to the said X two false and counterfeit coins, one of them in the resemblance [*or* likeness] and similitude of a gold coin of the coinage of the United States of America called a quarter-eagle, and the other in the resemblance and similitude of a foreign coin of Mexico called a dollar, then made current and then in actual use and circulation as money within the said United States; he the said A then and there, while so uttering and passing the said coins, well knowing them to be false and counterfeit; against the peace, &c.[6]

[1] For English forms, see 2 Chit. Crim. Law, 105; Archb. Crim. Pl. & Ev. 19th ed. 806; Reg. *v.* Turner, 2 Moody, 42. In this case, the majority of the judges held it to be sufficient under 2 Will. 4, c. 34, to say, "three pieces of the queen's current silver coin called sixpences then and there feloniously did gild with materials capable of producing the color of gold, with intent to make the same resemble and pass for the queen's current gold coin called half-sovereigns; against," &c.

[2] For the meaning of the verbs to "utter," to "put off," to "pass," &c. see Stat. Crimes, § 306–309; Crim. Law, II. § 605–608; procedure, as to coin, Crim. Proced. II. § 257–263; as to forged paper, &c. Ib. II. § 425–425 *b*, 442, 447, 453, 460.

[3] Ante, § 32.

[4] Crim. Proced. II. § 258. And see Archb. Crim. Pl. & Ev. 19th ed. 812 The present 24 & 25 Vict. c. 99, § 9, is a re-enactment of 2 Will. 4, c. 34, § 7.

[5] Omit where the offence is misdemeanor.

[6] I have drawn this form with a sort of general reference to our statutes, State and National, but especially with R. S. of U. S. § 5457, lying before me. And see Crim. Proced. II § 258. For other forms, see 2 Chit. Crim. Law, 112; 6 Cox C. C. App. 79. In interpreting our statutes, and in framing indictments upon them, we may derive help from Rex *v.* Franks, 2 Leach, 4th ed. 644. By 15 Geo. 2, c. 28, it was made punishable for one to "utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons." And the judges held, that, while the word "tender" was qualified by the words "in payment," "utter" was not; so that an indictment for uttering need not aver that the coin was passed as good. It sufficed to say, —

That A, &c. on, &c, at, &c. "one piece of false and counterfeit money, made and coun-

§ 338. **Uttering after Former Conviction.** — How the indictment should be for an uttering after a former conviction appears in previous explanations,[1] compared with the last section.[2]

§ 339. **Two Utterings on Same Day or within Ten Days.** — Under a statute simply making punishable the uttering of counterfeit coin, a count would be double and therefore bad which should charge two separate and distinct utterings. But where the provision is, that two utterings on one day or within ten days of each other shall be punished in a particular way, there is only one offence committed by both utterings, and both must be alleged in one count.[3] The method is to set out the first as though it alone constituted the offence; and then, before the words "against the peace," charge the second in like manner. Thus, —

[After setting out the first uttering, proceed]: and afterward, on, &c. being the same day [*or* within ten days of the said day] whereon the said A so as aforesaid uttered and passed the said counterfeit coin, he the said A did, &c. [averring the second uttering as though it were alone the offence].[4]

terfeited in the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called a shilling, then and there unlawfully, unjustly, and deceitfully did utter to one X, he the said A at the time when he so uttered the said piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit;" against the peace, &c.

English forms for various modifications of this offence may be found in Archb. Crim. Pl. & Ev. 19th ed. 810, 812, 814, 815; 2 Chit. Crim. Law, 111, 113, 114, 117; Rex *v.* Deane, 4 Went. Pl. 53. For two utterings in one day, Rex *v.* Smith, 2 Leach, 4th ed. 956, Russ. & Ry. 5; Rex *v.* Martin, 2 Leach, 4th ed. 923; Reg. *v.* Jones, 9 Car. & P. 761. Two in ten days, 6 Cox C. C. App. 80; Rex *v.* Tandy, 2 Leach, 4th ed. 833; Rex *v.* Michael, 2 Leach, 4th ed. 938, Russ. & Ry. 29. Uttering, having other counterfeit coin in possession, Reg. *v.* Page, 2 Moody, 219, 221, note, 9 Car. & P. 756. After conviction of former offence, Reg. *v.* Page, supra; Rex *v.* Booth, Russ. & Ry. 7; Reg. *v.* Thomas, Law Rep. 2 C. C. 141, 143, 13 Cox C. C. 52. Various modifications of the offence under our American statutes, —

Arkansas. — Gabe *v.* The State, 1 Eng. 540.

California. — People *v.* White, 34 Cal. 183.

Georgia. — Gentry *v.* The State, 6 Ga. 503.

Indiana. — Dashing *v.* The State, 78 Ind. 357.

Massachusetts. — Commonwealth *v.* Bond, 1 Gray, 564.

Ohio. — Leonard *v.* The State, 29 Ohio State, 408.

Tennessee. — Peck *v.* The State, 2 Humph. 78; McKinley *v.* The State, 8 Humph. 72.

Virginia. — Kirk *v.* Commonwealth, 9 Leigh, 627.

Wisconsin. — Wilson *v.* The State, 1 Wis. 184.

[1] Ante, § 91–96.

[2] See also, for forms, places referred to in the last section. The reader should not overlook any statutes in his own State, in modification of the common-law rules of pleading the former conviction.

[3] Crim. Proced. I. § 432 et seq.; Rex *v.* Tandy, 2 Leach, 4th ed. 833; Rex *v.* Martin, 2 Leach, 4th ed. 923.

[4] Compare with Archb. Crim. Pl. & Ev.

§ 340. **Uttering, having other Counterfeits in Possession.** — The indictment, after the manner of the form in the last section, sets out the uttering as though it alone constituted the offence, then proceeds: —

And that he the said A, then and there [if two days or places have before been alleged, alter the expression to avoid the uncertainty [1]], while so as aforesaid uttering the said pieces of counterfeit coin, had in his possession [*or* otherwise following the statutory words] one other piece [*or* ten other pieces] of counterfeit coin, &c. [describing the coin as in a charge of uttering it, and adhering to the statutory terms]; against the peace, &c.[2]

§ 341. **Possessing with Intent.** — The indictment for possessing counterfeit coin with the intent to utter it follows the statutory terms, and in other respects is similar to that for uttering; as, for example, —

That A, &c. on, &c. at, &c. [feloniously], deceitfully, and fraudulently had in his possession one piece [*or*, in his custody and possession at the same time ten similar pieces, *or* otherwise covering the statutory terms] of false and counterfeit coin [each of said pieces being] in resemblance and similitude of the gold coin of the coinage of the United States of America called an eagle [*or*, in resemblance and similitude of a silver coin current within this State called a Mexican dollar,[3] *or* otherwise adapting the allegation to the particular statutory terms and the special facts], then and there well knowing the said piece [*or* said several pieces] of false and counterfeit coin to be false and counterfeit, with the intent to utter and pass the same as true; against the peace, &c.[4]

§ 342. **Having the Tools, Materials, &c.** — The indictment for having in possession tools or materials for counterfeiting the coin follows the statutory terms, and particularizes the thing possessed. If, for example, the statute makes punishable "every person who shall knowingly have in his possession any mould,

19th ed. 815, and Reg. *v.* Jones, 9 Car. & P. 761. In Rex *v.* Martin, supra, the averment was simply, "and that the said A, on the said fourteenth day of February," &c. not saying otherwise that it was the same day, and it was adjudged adequate. Still the correctness of this decision is not quite clear, and it has not been followed in the English practice. Certainly the form in the text, or something like it, is more judicious.

[1] Crim. Proced. I. § 414.

[2] Archb. Crim. Pl. & Ev. 19th ed. 814; 2 Chit. Crim. Law, 114; Reg. *v.* Page, 2 Moody, 219, 221, note, 9 Car. & P. 756.

[3] Commonwealth *v.* Fuller, 8 Met. 313.

[4] For other forms, see Archb. Crim. Pl. & Ev. 19th ed. 817; 6 Cox C. C. App. 80; Rex *v.* Fuller, Russ. & Ry. 308; Reg. *v.* Jarvis, Dears. 552, 7 Cox C. C. 53; Reg. *v.* Martin, 11 Cox C. C. 343; Reg. *v.* Tierney, 29 U. C. Q. B. 181.

Massachusetts. — Commonwealth *v.* Griffin, 21 Pick. 523; Commonwealth *v.* Fuller, supra; Commonwealth *v.* Stearns, 10 Met. 256.

pattern, die, puncheon, engine, press, or other tool or instrument, adapted and designed for coining or making any counterfeit coin, in the similitude of any gold or silver coin current by law or usage in this State, with intent to use or employ the same, or to cause or permit the same to be used, in coining or making any such false and counterfeit coin as aforesaid," the allegations may be, —

That A, &c. on, &c. at, &c. did [feloniously [1] and] knowingly have in his possession a mould, a pattern, a die, a puncheon, a tool, and an instrument, severally and collectively adapted and designed [2] for coining and making one side of a counterfeit coin in the similitude of one side of the silver coin of the coinage of the United States of America, current by law and usage in this State, called a half-dollar,[3] to wit, the side whereon is the figure of an eagle, with the inscription "United States of America," [4] with intent to use and employ the same mould, pattern, die, puncheon, tool, and instrument, and cause and permit the same to be used and employed, in coining and making such false and counterfeit coin as aforesaid; against the peace, &c.[5]

§ 343. **Attempt — (Coin not Current).** — In England, by 37 Geo. 3, c. 126, § 2, it was declared punishable to "make, coin, or counterfeit any kind of coin not the proper coin of this realm nor permitted to be current within the same, but resembling or made with intent to resemble, or look like, any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin." Whereupon, by force of the common law, it became what with us would be termed an indictable attempt,

[1] To be inserted where the offence is felony.

[2] In the indictment before me the words here are "a certain mould, pattern, die, puncheon, tool, and instrument." There is some difference in the meaning of these several names of the thing, and this form of the allegation might not unfairly be held to require that it appear in the proofs to be all six. The changed language in the text is introduced to obviate the objection. Crim. Proced. I. § 586–588.

[3] R. S. of U. S. § 3513.

[4] Ib. § 3517. I doubt the necessity of designating the side. But, assuming it to be necessary, surely no more can be required than clearly to indicate which of the two sides, where the devices for each are defined by public law, is meant. In this view, I should think the simple expression "the reverse side" alone adequate.

[5] Commonwealth *v.* Kent, 6 Met. 221. For other forms, see 2 Chit. Crim. Law, 108, 110; Archb. Crim. Pl. & Ev. 19th ed. 819, 820; Rex *v.* Moore, 1 Moody, 122; Reg. *v.* Harvey, 11 Cox C. C. 662.

Arkansas. — Bell *v.* The State, 5 Eng. 536.

Illinois. — Miller *v.* People, 2 Scam. 233.

Massachusetts. — Commonwealth *v.* Morse, 2 Mass. 128.

North Carolina. — The State *v.* Collins, 3 Hawks, 191.

Texas. — Long *v.* The State, 10 Texas Ap. 186.

Virginia. — Commonwealth *v.* Scott, 1 Rob. Va. 695.

though the English judges gave it another name,[1] to prepare implements for such counterfeiting. And a count in the following form, in more words than are strictly necessary, was sustained: —

That A, &c. on, &c. at, &c. unlawfully, knowingly, and without any lawful authority or excuse, made [and caused to be made [2]], cut, and engraved, two certain dies upon one of which there was then and there made and impressed the figure, stamp, and apparent resemblance of one of the sides, to wit, the obverse side, of a certain silver coin, not the proper coin of this realm, nor permitted to be current within the same, called a half-dollar, being a silver coin of a certain foreign country, to wit, Peru [in South America, in parts beyond the seas [3]], and in and upon the other of which said dies there was then and there made and impressed the figure, stamp, and apparent resemblance of the other side, to wit, the reverse side, of the said silver coin of the said foreign state, with intent in so doing to use the said dies, and by means of the said dies so made as aforesaid feloniously and contrary to the form of the statute in such case made and provided to make, coin, and counterfeit divers pieces of coin not being the proper coin of this realm nor permitted to be current within the same, but resembling and looking like, and intending to resemble and look like, the said silver coin called a half-dollar of the said foreign country [and so the jurors aforesaid upon their oath aforesaid do say that the said A, in manner and form aforesaid, unlawfully did attempt feloniously to make, coin, and counterfeit certain coin, not the proper coin of this realm, nor permitted to be current within the same, but resembling silver coin of the said foreign country, to wit, Peru aforesaid [4]]; against the peace, &c.[5]

§ 344. **Other Forms** — might be given; but it is believed that the foregoing admit of such ready adaptation to differing statutory terms as to furnish ample guides for every emergency.[6]

[1] Crim. Law, I. § 435, 723 et seq.

[2] Needless. Ante, § 139, note.

[3] Obviously not necessary.

[4] I can see no occasion for the matter within these brackets, except possibly where the indictment is on a statute the terms of which have not been sufficiently employed in the other allegations, within the illustration in Crim. Proced. II. § 548–550.

[5] Reg. *v.* Roberts, Dears. 539, 7 Cox C. C. 39.

[6] For uttering a medal resembling a half-sovereign in size, figure, and color, but of less value, Reg. *v.* Robinson, Leigh & C. 604, 10 Cox C. C. 107. Selling counterfeit coin, Leonard *v.* The State, 29 Ohio State, 408.

CHAPTER XXVI.

CRUELTY TO ANIMALS.[1]

§ 345. **What for this Chapter.** — Cruelty to animals is, in England and most of our States, punishable under statutes so nearly identical that forms drawn after the common-law rules for use in one State will be nearly as serviceable in every other. In 1878, the "Massachusetts Society for the Prevention of Cruelty to Animals" issued, in a pamphlet, "Forms for Complaints" under the Massachusetts statute, and gave them wide circulation. Not many of them have been before the highest court; but, throughout the State, they have been in constant use in the lower tribunals, and no judicial person has pronounced any of them ill. Thus they have acquired an indorsement which, though not authority, approaches toward it. They are characterized by the brevity and absence of verbiage recommended in the present volume. This chapter, therefore, will consist of these forms, more or less modified in the expression, and such other forms as the books enable the author to furnish, accompanied by explanations and the needful references.

§ 346. **Overdriving.** — Under a statute making punishable one who "overdrives any animal" the allegations may be, —

That A, &c. on, &c. at, &c. did cruelly overdrive a certain horse[2] on which he was riding [*or* harnessed to a sleigh wherein he was riding], whereby the said horse was subjected to unreasonable and needless suffering; against the peace, &c.[3]

[1] For the direct discussion of this offence, with the pleading, practice, and evidence, see Stat. Crimes, § 1099–1122. Incidental, Crim. Law, I. § 594–597 *a*; Crim. Proced. I. § 356, 629.

[2] It would not do to use merely the statutory word "animal," being too indefinite; nor is it necessary to say "a certain animal, to wit, a horse," because the court judicially knows that a horse is an animal. Crim. Proced. I. § 568–570; Stat. Crimes, § 426, 440. The name of the owner need not be given. Stat. Crimes, § 1120; nor, as the value is immaterial to the punishment to be inflicted, need it be alleged. Crim. Proced. I. § 567; Stat. Crimes, § 427, 444, 445.

[3] Stat. Crimes, § 1118. In the collec-

§ 347. **Overloading.** — Under a statute to punish one who "overloads any animal," the averments may be, —

That A, &c. on, &c. at, &c. having the charge and custody of a certain vehicle, to wit, a wagon, and of two [1] horses [2] harnessed thereto, did then and there cruelly overload said horses, by then and there placing upon said wagon a large number of boxes, barrels, and articles of merchandise too heavy in weight for the strength of said horses, and urging and compelling them to draw and attempt to draw said wagon while so overladen as aforesaid; against the peace, &c.[3]

§ 348. **Driving Overloaded Horse.** — This offence differs little from the last. The statutory words "drive, when overloaded, any animal," may be covered thus, —

That A, &c. on, &c. at, &c. having the charge and custody of a certain horse-car and of two horses harnessed and attached thereto, and the said horses being then and there overloaded by the great weight of the said car and of excessive numbers of passengers admitted to and remaining in it, and by other things, all constituting a load too heavy for the strength of said horses, did then and there cruelly drive them when so overloaded, by then and there compelling them greatly to their suffering to draw the said overladen car; against the peace, &c.[4]

tion of "Forms" mentioned in the last section, the allegation is simply "did cruelly overdrive a certain horse," and the compiler deems this to be sufficient. There is no authority to the contrary. The case lies near the line dividing two classes, and the majority of pleaders will probably choose to be certainly safe. For the principles, see Stat. Crimes, § 1115–1119, and the places there referred to. And see Darnell *v.* The State, 6 Texas Ap. 482.

[1] Stat. Crimes, § 1121.

[2] See ante, § 346, note.

[3] As to how the allegations should be, see Stat. Crimes, § 1117. This, with one or two minor changes in mere words, is one of the forms mentioned ante, § 345. The New York statute is in similar terms, — "shall overload, or procure to be overloaded, any living creature," — and it was by Recorder Hackett in People *v.* Tinsdale, 10 Abb. Pr. N. S. 374, accepted as good to aver, —

That A, &c. being a conductor of a passenger car on the Bleecker Street and Fulton Ferry Railroad of the city of New York, and B, &c. being the driver of said passenger car of said railroad, on, &c. at, &c. did unnecessarily overload and procure said passenger car to be overloaded, then and there being attached to said passenger car two living creatures, to wit, two horses; by means whereof on a certain portion of the route of the said railroad the horses so attached to said passenger car were unable to draw said passenger car, but were, by reason of the premises aforesaid, overloaded, overdriven, tortured, and tormented; against the peace, &c.

This form may be rendered more certainly correct, and at the same time reduced, thus, —

That A, &c. and B, &c. on, &c. at, &c. the said A being the conductor and the said B the driver on a certain passenger horse-car there, drawn by two horses harnessed and attached thereto, did then and there cruelly overload said horses, by admitting into said horse-car too great a weight of passengers and other things for their strength, and requiring them to their great and needless suffering to draw and attempt to draw it so overladen; against the peace, &c.

[4] See ante, § 345, 347, and notes.

§ 349. **Torturing.** — The indictment for torturing is constructed on the same principles as that for overloading.[1] Under the statutory expression "tortures any animal," it may aver, —

That A, &c. on, &c. at, &c. did cruelly [2] torture a certain cow [3] by then and there cruelly beating, bruising, wounding, and mutilating the said cow [4] [*or*, a certain cat, by then and there hanging the said cat in the air by a string fastened around its neck; *or*, a certain rat, by then and there pouring over and upon its body an inflammable substance, setting fire thereto, and so cruelly and wantonly burning the said rat]; against the peace, &c.[5]

§ 350. **Cruel Beating.** — The offence of cruel beating requires no such expansion of the allegation as torturing.[6] Under the statutory words "cruelly beats any animal," it may be, —

That A, &c. on, &c. at, &c. did cruelly beat a certain horse;[7] against the peace, &c.[8]

§ 351. **Mutilating.** — The idea of mutilating is more complex than that of beating; and, unlike beating, the act admits of many forms. Hence, though probably the question has not been judicially determined, it is assumed that the indictment must set out the special manner of the mutilation.[9] Where the statutory words are "cruelly beats, mutilates, or cruelly kills any animal," it being necessary to interpret them before drawing the indictment thereon,[10] we are confronted by the question whether "cruelly" qualifies "mutilates" the same as "beats" and "kills." Considerably to shorten a dog's tail is to mutilate the animal; so that, if "cruelly" in the statute does not qualify "mutilates," the shortening is certainly within its penalties; otherwise it is so only if such mutilation is deemed "cruel." In this case, contrary to what is common when a doubt about the interpretation

[1] Stat. Crimes, § 1116, 1117.

[2] I insert this word "cruelly" here, though it is not in the statute, and though I do not deem it necessary. No indictment is drawn in absolutely the fewest words the pleader thinks will pass. The statutes contemplated in this chapter are all construed with a view to protecting the animal from *cruelty*, — there might be, for example, a torturing which would not be cruel because necessary or otherwise justifiable, — and so it seems to be appropriate in averment to say "cruelly torture," &c.

[3] Ante, § 346, note.

[4] Commonwealth *v.* Whitman, 118 Mass. 458.

[5] Ante, § 345.

[6] Stat. Crimes, § 1115, 1116.

[7] Ante, § 346, note.

[8] Commonwealth *v.* McClellan, 101 Mass. 34; Commonwealth *v.* Lufkin, 7 Allen, 579.

[9] Stat. Crimes, § 1115–1119.

[10] Ante, § 32.

presents itself, we can so frame the allegations without resorting to a second count as to leave the question for the final adjudication of the court.[1] They may be, —

That A, &c. on, &c. at, &c. did cruelly mutilate a certain dog,[2] by then and there cutting off a large piece, to wit, a piece six inches in length, of the tail of the said dog; against the peace, &c.[3]

§ 352. **Wilful and Wanton Wounding.** — What is a "wound" we saw in another connection.[4] The idea is reasonably precise and single; so that the manner of the wounding, or the particulars of the wound, need not be averred.[5] Therefore a statute in Texas having made it punishable "if any person shall wilfully and wantonly kill, maim, *wound*, &c. any dumb animal," it was adjudged adequate to say, —

That A, &c. on, &c. at, &c. unlawfully did wilfully and wantonly wound a certain bull; against the peace, &c.[6]

§ 353. **Cruel Killing.** — Under a statute to protect the owners of animals from malicious mischief to them as property, to "kill" an animal presents a simple and not a double or complex idea, and in averment the method of killing being immaterial need not be stated.[7] But under an enactment made to shield the animal from needless suffering, "cruelly" to kill it involves a great variety of methods, and the method of killing is that wherein the offence consists; consequently it must be stated in the indictment.[8] Where the statutory words are "cruelly kills any animal," the allegations may be, —

That A, &c. on, &c. at, &c. did cruelly kill a certain woodchuck,[9] by then and there burning and roasting it to death [*or*, a certain dog, by then and there wantonly and without justifiable cause throwing the said dog from and out of a high window down to and upon the ground, thereby so wounding and bruising the said dog that it was put into great pain

1 Consult again ante, § 32.

2 Ante, § 346, note.

3 This is one of the "Forms" mentioned ante, § 345.

4 Stat. Crimes, § 314, and see § 216.

5 Thus, under the statutory words (24 & 25 Vict. c. 100, § 18), "shall unlawfully and maliciously by any means whatsoever wound, &c. any person," the common form of the averment is, that the defendant "unlawfully and maliciously did wound" him, not specifying further. Archb. Crim. Pl. & Ev. 19th ed. 720, 721. And see Rex *v.* Owens, 1 Moody, 205; Reg. *v.* Bullock, Law Rep. 1 C. C. 115.

6 The State *v.* Brocker, 32 Texas, 611.

7 Stat. Crimes, § 446.

8 Stat. Crimes, § 1119.

9 Ante, § 346, note. If the pleader should doubt, as he will not be likely to, whether the name woodchuck belongs to the general English language or is local, he may say "a certain animal then and there called a woodchuck."

and torment for fifteen minutes and more, continuing therein until afterward it did then and there of the said cruel wounds and bruises die; *or*, a certain rat, by then and there pouring over and upon its body an inflammable substance, setting the said inflammable substance on fire, and thereby causing it in great and needless pain and suffering then and there to die]; against the peace, &c.[1]

§ 354. **Depriving of Necessary Sustenance.** — Under the statutory words "deprives of necessary sustenance any animal" the allegations may be, —

That A, &c. on, &c. [as at ante, § 80, or with the continuando as at ante, § 83, either method being permissible], at, &c. having the care and custody of a certain horse,[2] under the duty to provide the said horse with necessary sustenance, did then and [during the whole time aforesaid [3]] there cruelly deprive the said horse of necessary sustenance; against the peace, &c.

§ 355. **Inflicting Unnecessary Cruelty.** — Upon a statute punishing one who, "having the charge or custody of any animal, either as owner or otherwise, inflicts unnecessary cruelty upon the same," the allegations may be, for example, —

That A, &c. on, &c. at, &c. having the charge and custody of a certain calf, did then and there inflict unnecessary cruelty upon the same, by laying it upon its side, and cruelly placing and piling upon it the bodies of three other calves, whose weight did then and there and thereby press upon, crush, and torture the said calf so laid upon its side beneath said other calves as aforesaid [*or*, a certain cow, did then and there inflict unnecessary cruelty thereon, by then and there fastening the said cow to a wagon drawn by a horse, and driving the same, with the said cow so fastened to said wagon, at a furious rate of speed, faster than the said cow was able to travel, thereby cruelly dragging the said cow in great pain and suffering after said wagon]; against the peace, &c.[4]

§ 356. **Not providing Proper Shelter.** — Under a statute to punish one who, "having the charge or custody of any animal, either as owner or otherwise, unnecessarily fails to provide the same with proper food, drink, shelter, or protection from the weather," it is good in averment to say, —

[1] Ante, § 345. In Collier *v.* The State, 4 Texas Ap. 12, where the indictment is otherwise constructed, the terms and purposes of the statute are different.

[2] Ante, § 346, note.

[3] To be inserted only if the continuando is used. And probably it is not even then necessary. Ante, § 84.

[4] See ante, § 345, 346, note.

That A, &c. on, &c. [without the continuando, as at ante, § 80, or with it, as at ante, § 83, either being permissible], at, &c. having the charge and custody of a certain horse,[1] under the duty to provide the said horse with proper shelter and protection from the weather,[2] did then and [during the whole time aforesaid [3]] there unnecessarily and cruelly fail to provide the said horse with proper shelter and protection from the weather; against the peace, &c.

§ 357. **Driving when Unfit for Labor.** — A statute making punishable "every owner, possessor, or person having the charge or custody of any animal, who cruelly drives or works the same when unfit for labor, or cruelly abandons the same," is sufficiently covered as to the driving by, —

That A, &c. on, &c. at, &c. having the charge and custody of a certain horse, which by reason of a recent sprain in the cords of one of its legs so that any movement of said leg created great pain, and by reason of a sickness the name whereof is to the jurors unknown, and, &c. [setting out as many distinct and not repugnant causes as the pleader chooses [4]], was then and there unfit for labor, did then and there cruelly drive said horse along the public way for a long distance and time, thereby then and there inflicting upon the said horse great and cruel pain and suffering; against the peace, &c.

§ 358. **Abandoning.** — The allegations, upon the statutory words given in the last section, for abandoning an animal, may be, —

That A, &c. on, &c. at, &c. having the charge and custody of a certain horse, which, by reason that one of its legs was broken, was in great pain and suffering, unable to move about, and incapable of supplying itself with food, and so in great need of being relieved and cared for by the hand of man, did then and there cruelly abandon the said horse so in pain, suffering, and want, without relieving or caring for the same; against the peace, &c.

§ 359. **Cruelly Transporting.** — Adding, to the statutory words now in contemplation,[5] "or who carries the same, or causes the

[1] Ante, § 346, note.

[2] The reader perceives that the statute is silent as to this duty. But it is a part of the common law, that, for a neglect to be punishable, it must be accompanied by a duty. Crim. Law, I. § 314, 433, 557, 883, 884; II. § 667; Crim. Proced. II. § 538, 538 *a*. And statutes are construed in harmony with the common law, and as contracted and expanded in meaning by it. Stat. Crimes, § 88, 119, 123, 134–144. Hence interpretation puts into the present statute the clause here introduced into the indictment. And an indictment is always to be drawn, not on the verbal, but on the interpreted statute. Ante, § 32 and the places there referred to.

[3] See ante, § 354, note.

[4] Within the principles stated ante, § 19–21.

[5] Ante, § 357.

same to be carried, in or upon any vehicle or otherwise, in an unnecessarily cruel or inhuman manner," we have those whereon is drawn the following form : —

That A, &c. on, &c. at, &c. having the charge and custody of a certain sheep, did then and there carry the said sheep in an unnecessarily cruel and inhuman manner, in and upon a vehicle [*or* wagon, &c.] by him driven and under his control, by then and there, &c. [saying how the animal was carried]; against the peace, &c.

§ 360. **Suffering Cruelty to be inflicted.** — Again, adding to the statutory words now in contemplation,[1] "or knowingly and wilfully authorizes or permits the same to be subjected to unnecessary torture, suffering, or cruelty of any kind," we have those on which the following form is constructed: —

That A, &c. on, &c. at, &c. having the charge and custody of a certain dog,[2] did then and there knowingly and wilfully authorize and permit the said dog to be subjected to unnecessary torture, suffering, and cruelty, by then and there knowingly and wilfully permitting it to be bitten, mangled, and cruelly tortured by a certain other dog; against the peace, &c.[3]

§ 361. **Cock-fighting as Cruelty.** — Under some or all of the statutory words "cruelly beat, ill-treat, overdrive, abuse, or torture,"[4] is included cock-fighting.[5] It is deemed to be good in allegation to say, —

That A, &c. on, &c. at, &c. did cruelly beat, abuse, ill-treat, and torture two certain cocks,[6] by then and there wilfully and cruelly setting on, provoking, inciting, and causing each to fight the other in a barbarous and unlawful cruel sport called a cock-fight, whereby each of said cocks was cruelly torn, mangled, and maltreated; against the peace, &c.[7]

§ 362. **Other Forms.** — These forms might be further extended;[8] but it is believed that, without more, the pleader will

[1] Ante, § 357, 359.

[2] Ante, § 346, note.

[3] Commonwealth *v.* Thornton, 113 Mass. 457.

[4] 12 & 13 Vict. c. 92, § 2.

[5] Stat. Crimes, § 1110; Budge *v.* Parsons, 3 B. & S. 382.

[6] Compare with ante, § 222. And see ante, § 346, note. "Cock" is the word in Budge *v.* Parsons, supra. I presume "rooster" would be equally well.

[7] I do not deem the form in Budge *v.* Parsons, supra, one which ought practically to be followed, not deeming it necessary to say whether or not it is sufficient in law. For a form for assisting in a game of cock-fighting, see Morley *v.* Greenhalgh, 3 B. & S. 374.

[8] **Shooting Pigeons.** — See, for a form for this, The State *v.* Bogardus, 4 Misso. Ap. 215.

find in them and the accompanying explanations a sufficient guide for all emergencies.

For DEAD BODIES, see SEPULTURE.
DEFILEMENT OF WOMEN, see CONSPIRACY — RAPE — SEDUCTION AND ABDUCTION, &c.
DISOBEYING ORDER, see ante, § 322, 323.
DISORDERLY HOUSE, see NUISANCE.
DISSUADING WITNESS, see ante, § 328.

CHAPTER XXVII.

DISTURBING MEETINGS.[1]

§ 363. **In General.** — The offence of disturbing meetings with the allegations for it, under the common law and the various statutes, is of pretty wide range; the considerations relating to which are the special nature of the meeting, the sort of disturbance resorted to, and, where it is statutory, the terms of the particular statute. As to the indictment, what is special to this offence is that, —

§ 364. **Alleging Disturbance.** — The particular disturbance must, in principle, and by the general practice, be set out, instead of the mere averment that the defendant disturbed the meeting; though there is much not well considered authority to the effect that the latter alone will suffice.[2] But if, for example, it was by words spoken, they need not be given as in oral blasphemy,[3] some forms of contempt of court,[4] and other offences the gist whereof consists of the special words; for, whether the disturbance was by words or acts, they need only be characterized in the way of general description.[5]

§ 365. **Formula for Indictment.** — The following formula, subject to be varied, when on a statute, to conform to the particular statutory terms, indicates how the indictment may be: —

That A, &c. [ante, § 74–77], on, &c. at,[6] &c. [ante, § 80. If the day of the week is material, as, for example, that it was Sunday, lay the time as

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, I. § 542; II. § 301–310 *a*; Crim. Proced. II. § 284–301. Incidental, Crim. Law, II. § 249; Crim. Proced. I. § 374, 441, 484; Stat. Crimes, § 211.

[2] Crim. Proced. II. § 285, 287, 289, 290.

[3] Ante, § 242–244.

[4] Ante, § 326.

[5] Crim. Proced. ut sup.; The State *v.* Hinson, 31 Ark. 638; Bush *v.* The State, 5 Texas Ap. 64; Richardson *v.* The State, 5 Texas Ap. 470; Kidder *v.* The State, 58 Ind. 68; The State *v.* Stubblefield, 32 Misso. 563; Coekreham *v.* The State, 7 Humph. 11; United States *v.* Brooks, 4 Cranch C. C. 427; The State *v.* Swink, 4 Dev. & Bat. 358; The State *v.* Jasper, 4 Dev. 323.

[6] Crim. Proced. II. § 286 *a*.

in ante, § 85], did wilfully interrupt and disturb[1] [*or*, follow the statutory expression[2]] a congregation of people there lawfully and peaceably assembled for, &c. [setting out enough to show that the meeting is one the disturbance of which is indictable. For various forms for this see Crim. Proced. II. § 286], by then and there, &c. [saying what the disturbance was.[3] The pleader may here set down, in the one count, whatever he chooses to present to the jury, and the indictment will be sustained by proof of enough to constitute an offence[4]]; against the peace, &c.[5]

§ 366. **Common-law Form — (Disturbing Religious Worship).** — The books do not contain any form for this offence at common law so neatly constructed, or become so venerable by age and use, as to render important its preservation in exact words. But, removing minor blemishes, we have such as, —

That A, &c. on, &c. [being Sunday[6]], at, &c. did, in the parish church there [while the people of the said parish and others were therein assembled for divine service[7]], and during the celebration thereof, unlawfully and unjustly take and remove the bench of one X from its ancient and proper place, and also[8] did then and there unlawfully, unjustly, and irrev-

[1] The expression here varies greatly in the precedents, and the pleader has a wide choice.

[2] Crim. Proced. II. § 296.

[3] Ante, § 364.

[4] Crim. Proced. II. § 295; ante, § 19–21.

[5] For forms see Archb. Crim. Pl. & Ev. 19th ed. 998; 2 Chit. Crim. Law, 21–34; 4 Ib. 3; Rex *v.* Wilson, 4 Went. Pl. 362; Rex *v.* Parry, Trem. P. C. 239; Rex *v.* Hube, 5 T. R. 542.

Alabama. — Smith *v* The State, 63 Ala. 55.

Arkansas. — The State *v.* Horn, 19 Ark. 578; The State *v.* Hinson, 31 Ark. 638.

Connecticut. — The State *v.* Gager, 26 Conn. 607, 28 Conn. 232.

Georgia. — Hicks *v.* The State, 60 Ga. 464.

Indiana. — The State *v.* Zimmerman, 53 Ind. 360; Kidder *v.* The State, 58 Ind. 68; Smith *v.* The State, 71 Ind. 250; Cooper *v.* The State, 75 Ind. 62.

Massachusetts. — Commonwealth *v.* Symonds, 2 Mass. 163; Commonwealth *v.* Hoxey, 16 Mass. 385; Commonwealth *v.* Bearse, 132 Mass. 542.

Missouri. — The State *v.* Bankhead, 25 Misso. 558; The State *v.* Stubblefield, 32 Misso. 563; The State *v.* Schieneman, 64 Misso. 386.

New York. — People *v.* Degey, 2 Wheeler Crim. Cas. 135; People *v.* Crowley, 23 Hun, 412.

North Carolina. — The State *v.* Jasper, 4 Dev. 323; The State *v.* Swink, 4 Dev. & Bat. 358; The State *v.* Fisher, 3 Ire. 111; The State *v.* Bryson, 82 N. C. 576.

Pennsylvania. — Campbell *v.* Commonwealth, 9 Smith, Pa. 266.

Rhode Island. — The State *v.* Read, 12 R. I. 135.

Tennessee. — Cockreham *v.* The State, 7 Humph. 11.

Texas. — Lockett *v.* The State, 40 Texas, 4; Bush *v.* The State, 5 Texas Ap. 64; Richardson *v.* The State, 5 Texas Ap. 470; Copping *v.* The State, 7 Texas Ap. 61.

Virginia. — Commonwealth *v.* Daniels, 2 Va. Cas. 402.

United States. — District of Columbia. United States *v.* Brooks, 4 Cranch C. C. 427.

[6] In the form before me, but I presume not necessary.

[7] Not in the form before me. In the absence of this it appears only inferentially that there was a meeting; hardly, in reason, sufficient.

[8] This is an instance of charging more than one act of disturbance as explained ante, § 365.

erently disturb and hinder one Y, then being curate of the said parish church, and in the execution of his office, and in the reading of divine service[1] [*or*, as the expression has been altered in some American cases, in the Ebenezer Baptist Church there, during the celebration of divine service, unlawfully, unjustly, and irreverently did disturb and hinder one Y, then being the minister officiating in the said church, and then being in the discharge therein of his sacred functions and in the performance of divine service];[2] against the peace, &c.

§ 367. **Another.** — Or, under other facts, the allegations at common law may be, —

That A, &c. on, &c. [being, &c. as at ante, § 85, or not, as the fact is and the pleader chooses], at, &c. did unlawfully, maliciously, and irreverently hinder and disturb a congregation of people lawfully assembled in a building called the M meeting-house [*or* church; *or* in the dwelling-house of one N], for the purpose of, and then and there engaged in, public divine worship [and prayer to Almighty God]; by then and there loudly talking and profanely cursing and swearing, and thereby and otherwise then and there making a great noise in and near the said meeting-house, and in the hearing of the people therein assembled and worshipping as aforesaid [*or*, by then and there making divers ridiculous and indecent actions and grimaces, talking and laughing in a loud voice, and otherwise misbehaving himself during the performance of such divine service]; against the peace, &c.[3]

§ 368. **Secular Meeting at Common Law.**[4] — The allegation will vary with the nature of the meeting, and the laws under which it is held. It may, for example, be, —

That on, &c. at, &c. a meeting of the School Committee of the town of, &c. [*or* otherwise stating what the meeting was, according to the law and fact], having been duly summoned and called, was lawfully held; and then and there, while the said meeting was duly engaged in the transaction of the business for which it was so summoned and called [or otherwise], A, &c. and B, &c. came into the presence thereof, and wilfully and unlawfully, by loud noises, profane swearing, indecent talking and actions, and ludi-

[1] 2 Chit. Crim. Law, 21; Rex *v.* Parry, Trem. P. C. 239.

[2] People *v.* Degey, 2 Wheeler Crim. Cas. 135; People *v.* Crowley, 23 Hun, 412.

[3] United States *v.* Brooks, 4 Cranch C. C. 427; The State *v.* Jasper, 4 Dev. 323; The State *v.* Swink, 4 Dev. & Bat. 358. The allegation, as in The State *v.* Jasper, that the defendant was "a person regardless of the duties and solemnities of the public worship of God, and of the due observation of the Lord's day," and the conclusion that his conduct was "to the great disturbance and insult of the orderly people there, and on the said other days and times, then and there assembled," and similar averments in the other cases, are needless. Ante, § 46, 48.

[4] As to what meetings, see Crim. Law, I. § 542.

crous grimaces, hindered, disturbed, obstructed, and interrupted it in the transaction of its lawful business as aforesaid; against the peace, &c.[1]

§ 369. **Under Statutes — (English Form).** — Generally, for this offence, the indictment on a statute differs from that on the common law only in embracing the special statutory terms. And it is explained in "Criminal Procedure."[2] Thus, in England, the Toleration Act, after providing for the registration of places wherein Dissenters may lawfully worship, declares punishable any one who "shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this act, or any former act or acts of Parliament; or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation; or any person or persons there assembled."[3] And a form of indictment in common use, after setting out the registration of the place, — as, for example, "a certain house situate at, &c. therein to assemble and meet for religious worship," — proceeds, —

That afterward, on, &c. a congregation of Protestants, dissenting from the Church of England, of which the said X was then the teacher and preacher, were assembled for the public worship and service of Almighty God in the house aforesaid, so certified, registered, and recorded as aforesaid; and that A, &c. B, &c. and C, &c. then,[4] whilst the said congregation were so assembled as aforesaid, and during divine service, at, &c. aforesaid, unlawfully, willingly, and of purpose, maliciously and contemptuously did come into the said congregation, during divine service as aforesaid, and did then and there willingly, and of purpose, maliciously and contemptuously disquiet and disturb the said congregation by then and there talking, cursing, and swearing, with a loud voice, and also by talking with a loud voice to the said X, he the said X then and there being in the pulpit [the doors of the said meeting-house and place where the said congregation were so assembled as aforesaid not being then locked, barred, or bolted[5]]; against the peace, &c.[6]

[1] In Campbell *v.* Commonwealth, 9 Smith, Pa. 266, is the form of an indictment held good, but in principle of doubtful sufficiency, for disturbing a meeting of school directors. In Commonwealth *v.* Hoxey, 16 Mass. 385, the indictment, which was held good, was for disturbing a town meeting for the election of town officers.

[2] Crim. Proced. II. § 289–300.

[3] 52 Geo. 3, c. 155, § 12.

[4] Assuming that only one day has been alleged, as see ante, § 328 and note.

[5] An allegation like this could be required only to cover an exception in the statute.

[6] Archb. Crim. Pl. & Ev. 10th ed. 667, 19th ed. 998.

§ 370. **Simpler Form.** — Under the less complicated statutory words "shall interrupt a congregation assembled for the purpose of worshipping the Deity," it has been adjudged good simply to say, —

That A, &c. on, &c. at, &c. did [unlawfully, contemptuously, and of purpose[1]] interrupt a congregation of Methodists, then and there assembled for the purpose of worshipping the Deity, by then and there talking and swearing with a loud voice; against the peace, &c.[2]

§ 371. **Other like Forms** — may readily be drawn upon the statutes as required, it being deemed that further specimens would be superfluous.[3]

§ 372. **Trading, &c. near Camp-meeting.** — We have a few statutes against interrupting camp-meetings by trading and other things not harmonious with their objects, in the vicinity of the places where they are held; but the indictment for the offence is easily constructed, and no form for it need here be given.[4]

[1] Probably not necessary, not being in the statute.

[2] Cockreham *v.* The State, 7 Humph. 11.

[3] And see the forms in Kidder *v.* The State, 58 Ind. 68; The State *v.* Stubblefield, 32 Misso. 563; The State *v.* Hinson, 31 Ark. 638; Richardson *v.* The State, 5 Texas Ap. 470; Bush *v.* The State, 5 Texas Ap. 64; and other cases cited ante, § 365.

[4] See forms in Commonwealth *v.* Bearse, 132 Mass. 542; The State *v.* Read, 12 R. I. 135.

For DOG, see ante, § 177.
DOMESTIC ANIMALS, see ANIMALS.
DOUBLE OFFENCES, see ante, § 91 et seq.
DOUBLE VOTING, see ELECTION OFFENCES.

CHAPTER XXVIII.

DRUNKENNESS.[1]

§ 373. **Common-law Nuisance.** — A form of the indictment for the common-law nuisance of public drunkenness is given in "Statutory Crimes."[2] The dimensions of the offence are a little uncertain, and in a majority of our States any form of the indictment could be deemed only experimental.

§ 374. **Common Drunkard.** — Under a statute making it a misdemeanor to be a "common drunkard," the allegations may be, —

That A, &c. [ante, § 74–77] on, &c. at, &c. [without the continuando, as at ante, § 80, or with it, as at ante, § 83, at the election of the pleader[3]], was a common drunkard [having been on divers days and times within the six months then last past, at, &c. aforesaid, drunk and intoxicated by the voluntary and excessive use of spirituous and intoxicating liquors;[4] *or*, having been, at, &c. aforesaid, on three several days and times within six months next preceding the said day, intoxicated under such circumstances as to amount to a violation of decency[5]]; against the peace, &c. [ante, § 66–69].[6]

§ 375. **Drunk in Public Place.** — To be drunk in a public place is a misdemeanor under some of our statutes; as, in Indiana,

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Stat. Crimes, § 967–982. Incidental, Crim. Law, I. § 399, 1113–1117; Crim. Proced. I. § 869; Stat. Crimes, § 796, 1064 et seq. These references do not include the many places in which drunkenness as an excuse for crime is considered.

[2] Stat. Crimes, § 974. And see form in The State *v.* Deberry, 5 Ire. 371.

[3] Stat. Crimes, § 979; The State *v.* Kelly, 12 R. I. 535. And see the explanations in Crim. Proced. I. § 392, 397, 402 and note.

[4] Commonwealth *v.* Boon, 2 Gray, 74.

[5] The State *v.* Kelly, 12 R. I. 535. None of this matter in brackets is probably necessary, unless the statute contains more than the words "common drunkard." Stat. Crimes, § 977, 978. If it is necessary, the form should perhaps be more carefully considered. I have slightly amended both of these forms as extracted from the cases cited, but if I deemed them essential I should attempt still further improvement.

[6] For forms, see the cases before cited to this section; Commonwealth *v.* Whitney, 5 Gray, 85; Commonwealth *v.* Foley, 99 Mass. 499.

where the words are "any person of sound mind found in any public place in a state of intoxication." The allegation may be, —

That A, &c. on, &c. at, &c. was found[1] in a public street, highway, and sidewalk there, in a state of intoxication; against the peace, &c.[2]

§ 376. **Being Drunk.** — Under a statute making punishable any one who "is guilty of drunkenness by the voluntary use of intoxicating liquor,"[3] it has been adjudged adequate simply to cover its terms by saying that, at a time and place specified, the defendant was, "with force and arms,[4] guilty of the crime of drunkenness by the voluntary use of intoxicating liquor," — a form, said the court, "not to be commended."[5] The better allegation is, —

That A, &c. on, &c. at, &c. was, by the voluntary use of intoxicating liquor, drunk to the degree of drunkenness; against the peace, &c.[6]

[1] "Fonnd" is necessary under a statute in these terms. Stat. Crimes, § 980.

[2] The State *v.* Waggoner, 52 Ind. 481, 482; The State *v.* Moriarty, 74 Ind. 103; Stat. Crimes, § 975. The indictment being required to set out only *prima facie* guilt, and the *prima facie* presumption being that the defendant was sane, the allegations need not cover the statutory words "of sound mind." Crim. Proced. II. § 669. Likewise a "public street, highway, and sidewalk" being, as of law, a "public place" (Stat. Crimes, § 298), the indictment need not aver that such place was public; nor would it suffice to say simply that the offence was committed in "a public place." Stat. Crimes, § 903; ante, § 346 and note. For a form under the Vermont statute, see The State *v.* Deavitt, 47 Vt. 287.

[3] Mass. Pub. Stats. c. 207, § 26.

[4] Needless. Ante, § 43.

[5] Commonwealth *v.* Miller, 8 Gray, 484; Commonwealth *v.* McNamara, 116 Mass. 340.

[6] For forms, see the cases last above cited; also The State *v.* Bromley, 25 Conn. 6; The State *v.* Smith, 3 Heisk. 465, 466; The State *v.* First, 82 Ind. 81. **Drunkenness in Office** (as to which see Stat. Crimes, § 969). — Shanks *v.* The State, 51 Missis. 464, 467 (not good); Stat. Crimes, § 976, and see cases in Ib. § 969.

CHAPTER XXIX.

DUELLING.[1]

§ 377. **Elsewhere — Here.** — Duelling being, when death follows, murder, the consideration of it in this aspect belongs to the title "Homicide." We here contemplate it only as an attempt to kill, or breach of the peace; embracing challenges and the like.[2]

§ 378. **Challenging.** — Though the challenge is in most cases in writing it is, under the common law, optional with the pleader to set it out by its words or not; and it is the same of a verbal challenge.[3] The following is a familiar form for challenging at common law: —

That A, &c. [ante, § 74–77], [being a person of a turbulent and quarrelsome temper and disposition, and contriving and intending, not only to vex, injure, and disquiet one X, and do the said X some grievous bodily harm, but also to provoke, instigate, and excite the said X to break the peace and to fight a duel with and against him the said A[4]], on, &c. at, &c. [ante, § 80], wickedly, wilfully, and maliciously did write, send, and deliver [and cause and procure to be written, sent, and delivered[5]] unto him the said X a certain letter and paper writing, containing a challenge to fight a duel with and against him the said A, and which said letter and paper writing is as follows, that is to say, &c. [setting out the letter, with the innuendoes necessary to explain its meaning, as in libel; *or*, more simply, wickedly, wilfully, and maliciously did provoke, instigate, excite, and challenge the said X to fight a duel with and against him the said A]; [to the great damage, scandal, and disgrace of the said X, in contempt of, &c. and[6]] against the peace, &c. [ante, § 66–69].[7]

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 311–317; Crim. Proced. II. § 302–311. Incidental, Crim. Law, I. § 10 and note, 143, 540, 654; II. § 5; Crim. Proced. I. § 61.

[2] Crim. Law, II. § 311, 312.

[3] Crim. Proced. II. § 305; The State *v.* Farrier, 1 Hawks, 487; Commonwealth *v.* Rowan, 3 Dana, 395; Commonwealth *v.* Hart, 6 J. J. Mar. 119; Brown *v.* Commonwealth, 2 Va. Cas. 516.

[4] Not necessary. Ante, § 45, 46.

[5] Unnecessary. Ante, § 139 and note.

[6] Unnecessary. Ante, § 48.

[7] Archb. Crim. Pl. & Ev. 10th ed. 604, 19th ed. 910. There is no need to multiply counts. If the pleader is in doubt how the

§ 379. **Same on Statute.** — Under a statute making punishable one "who shall give, accept, or knowingly carry a challenge, in writing or otherwise, to fight in single combat with any deadly weapon, either in or out of the State, and be thereof convicted," the allegations may be, —

That A, &c. on, &c. at, &c. did give unlawfully and verbally a challenge to one X to fight him the said A, in single combat, with a deadly weapon, to wit, a pistol; against the peace, &c.[1]

§ 380. **Provoking One to challenge.**[2] — There is no single set of words in which alone this offence can be charged. The allegations at common law may be, for example, —

That A, &c. on, &c. at, &c. did wickedly and maliciously endeavor to stir up, provoke, and excite one X to challenge the said A to fight with him a duel; by then and there writing and sending to the said X a letter of the tenor [*or* effect[3]] following, that is to say, &c. [setting out the letter with the innuendoes necessary to explain its meaning; *or*, by uttering and declaring in the presence and hearing of the said X the following words, — you are a scoundrel and a liar, and I shall take care to let the world know that you are so]; with intent to instigate, excite, and provoke the said X to challenge him the said A to fight a duel with and against him the said A;[4] against the peace, &c.[5]

§ 381. **Other Forms.** — The foregoing forms cover, in substance, the derelictions within the present title. Should other

challenge was, or how it should be alleged, he can put all into one count, and at the trial rely on so much as he is able to prove, within the principles explained ante, § 18–22. But he should say "did, &c. and, &c. and, &c." or by some other like words avoid the appearance of charging two or more offences. To put the allegations in the way they stand in two or more counts would render the one count double. For other forms for challenging, at common law and on statutes, see 3 Chit. Crim. Law, 849–862; 4 Went. Pl. 315, 317; 6 Ib. 385; Rex *v.* Devonshire, Trem. P. C. 188; Rex *v.* Philipps, 6 East, 464.

Alabama. — Ivey *v.* The State, 12 Ala. 276.

Kentucky. — Commonwealth *v.* Hart, 6 J. J. Mar 119; Commonwealth *v.* Rowan, 3 Dana, 395.

Massachusetts. — Commonwealth *v.* Boott, Thacher Crim. Cas. 390; Commonwealth *v.* Hooper, Thacher Crim. Cas. 400.

New Jersey. — The State *v.* Gibbons, 1 Southard, 40.

North Carolina. — The State *v.* Farrier, 1 Hawks, 487.

South Carolina. — Cunningham *v.* The State, 2 Speers, 246.

Virginia. — Brown *v.* Commonwealth, 2 Va. Cas. 516.

[1] Ivey *v.* The State, 12 Ala. 276.

[2] Crim. Law, II. § 312; Crim. Proced. II. § 310.

[3] Crim. Proced. I. § 559, 560. In the form in Chitty the words are set out by their tenor. But this would seem not to be necessary. Ante, § 378; Crim. Proced. II. § 310.

[4] This clause is a sort of repetition of what has gone before, and its necessity is doubtful. I retain it because it is in each of the three precedents cited below.

[5] 3 Chit. Crim. Law, 861; Archb. Crim. Pl. & Ev. 10th ed. 605, 19th ed. 911; Rex *v.* Philipps, 6 East, 464.

forms[1] be needed, they may be readily drawn in analogy to those here given.

[1] The books furnish the following: For carrying a challenge, 3 Chit. Crim. Law, 855. Accepting challenge, Commonwealth *v.* Rowan, 3 Dana, 395. Aiding and abetting a duel, Commonwealth *v.* Dudley, 6 Leigh, 613. Feloniously shooting at one in a duel, Reg. *v.* Douglas, Car. & M. 193. Sending a challenge about money lost in gaming, 3 Chit. Crim. Law, 862.

For EAVESDROPPING, see NUISANCE.

CHAPTER XXX.

ELECTION OFFENCES.[1]

§ 382. **Elsewhere.** — Under the titles Bribery,[2] Liquor Selling, Perjury, and some others, are forms of indictment for the several offences as against elections. In this chapter, —

§ 383. **How Chapter divided.** — We shall consider the indictment as to, I. Illegal Voting and Attempts thereat; II. Offences by Election Officers; III. Other Obstructions and Undue Influencing; IV. Betting on Elections; supplemented by, V. Practical Suggestions.

I. *Illegal Voting and Attempts thereat.*

§ 384. **Formula.** — The indictment which, when on a statute, must be so shaped as to cover the statutory terms, may, if it does, or if on the common law, aver, —

That on, &c. at, &c. [ante, § 80] there was an election [*or* meeting of the electors, *or* town meeting, &c.] duly and in due form of law had and held for the choice of, &c.[3] and that A, &c. [ante, § 74–77], did then and there at said election [*or* meeting], &c. [setting out his offence]; against the peace, &c. [ante, § 66–69].[4]

[1] For the direct elucidations of these offences, with the pleading, practice, and evidence, see Stat. Crimes, § 802–843, 931–949. Collateral, Crim. Law, I. § 471, 686, 821; Crim. Proced. I. § 627; Stat. Crimes, § 205, 852, 872.

[2] Ante, § 248, 249.

[3] Stat. Crimes, § 832–834; ante, § 248, 249.

[4] For forms see Reg. *v.* Bent, 1 Cox C. C. 356, 1 Den. C. C. 157, 160, 2 Car. & K. 179; Reg. *v.* Bowler, Car. & M. 559;

§ 385. **Double Voting.** — None of the variously-worded precedents in the books for double voting are constructed with much neatness or skill. The following, which does not literally copy any particular one, embraces what of all is needful, good either on the common law[1] or on a statute the terms whereof it duly covers: —

That on, &c. at, &c. there was an election duly and in due form of law had and held for the choice of, &c.; and, at said election, A, &c. who was then and there a voter entitled to cast one ballot bearing the several names of the respective persons whom he wished chosen to the said several offices, did nevertheless then and there surreptitiously and corruptly cast at one time two such ballots [*or*, having cast such ballot and retired, did then and there corruptly return to the place of voting and surreptitiously cast another such ballot], [*or*, going back further in the form, there being a place for voting called the M precinct, and another called the N precinct, A, &c. did then and there cast his vote in due form in the said M precinct, and afterward did then and there corruptly and surreptitiously repair to and so cast another vote in the said N precinct];[2] against the peace, &c.[3]

Reg. *v.* Vaile, 6 Cox C. C. 470; Reg. *v.* Hague, 9 Cox C. C. 412; Reg. *v.* Turner, 12 Cox C. C. 313, 4 Eng. Rep. 561; Reg. *v.* Hogg, 25 U. C. Q. B. 66.

Alabama. — Nettles *v.* The State, 49 Ala. 35; Carter *v.* The State, 55 Ala. 181.

Connecticut. — The State *v.* Gorham, 11 Conn. 233.

Florida. — Humphreys *v.* The State, 17 Fla. 381, 383; Dennis *v.* The State, 17 Fla. 389, 390.

Indiana. — Quinn *v.* The State, 35 Ind. 485.

Maine. — The State *v.* Boyington, 56 Maine, 512; The State *v.* Symonds, 57 Maine, 148.

Massachusetts. — Commonwealth *v.* Silsbee, 9 Mass. 417, Commonwealth *v.* Shaw, 7 Met. 52; Commonwealth *v.* Bradford, 9 Met. 268; Commonwealth *v.* Desmond, 122 Mass. 12.

Minnesota. — The State *v.* Welch, 21 Minn. 22; The State *v.* Davis, 22 Minn. 423.

New Hampshire. — The State *v.* Marshall, 45 N. H. 281.

New Jersey. — The State *v.* Moore, 3 Dutcher, 105.

New York. — People *v.* Standish, 6 Parker C. C. 111; Burns *v.* People, 5 Lans. 189.

Oregon. — The State *v.* Bruce, 5 Oregon, 68.

Rhode Island. — The State *v.* Fitzpatrick, 4 R. I. 269; The State *v.* Macomber, 7 R. I. 349.

[1] As to the indictability of this offence at common law, see Crim. Law, I. § 471. In addition to the reason there given, the court, in Commonwealth *v.* Silsbee, 9 Mass. 417, 418, observed: "There cannot be a doubt that the offence described in the indictment is a misdemeanor at the common law. It is a general principle that, where a statute gives a privilege and one wilfully violates such privilege, the common law will punish such violation. In town meetings every qualified voter has equal rights, and is entitled to give one vote for every officer to be elected. The person who gives more infringes and violates the rights of the other voters, and for this offence the common law gives the indictment."

[2] The indictment in Commonwealth *v.* Silsbee, supra, concludes: "to the great destruction of the freedom of elections, to the great prejudice of the rights of the other qualified voters in said town of Salem, to the evil example of others in like case to offend," &c. The court observes that this "is proper for the case." Still it is needless. Ante, § 48.

[3] Commonwealth *v.* Silsbee, supra; The State *v.* Welch, 21 Minn. 22; The State *v.* Davis, 22 Minn. 423; Commonwealth *v.*

§ 386. **Voting when not Qualified.** — The form may be, —

That on, &c. at, &c. [setting out the holding of the election and its purpose as at ante, § 384, 385 [1]]; and that A, &c. at said election, did then and there, not being and knowing himself not to be then and there duly qualified to vote thereat by reason that, &c. [setting out the want of qualification;[2] as, that he had not attained the age of twenty-one years; *or*, that he was not then an inhabitant, &c.;[3] *or*, that he had made a bet then depending on the result of said election], nevertheless wilfully and corruptly give in his vote for persons to serve in said offices, as though he were and as pretending to be qualified; against the peace, &c.[4]

§ 387. **Falsely Personating.** — There is some English and Canadian authority apparently to the effect, that it is not an offence at the common law falsely to personate a voter at a municipal election and vote on his right.[5] But this is plainly a voting without being qualified. And there can be little doubt that it would be deemed indictable at common law in the greater number of our States.[6] It is a criminal misdemeanor or felony under various English and some American statutes.[7] The indictment will vary with the statutory terms, and with the differing rules which govern an election, and it is practically more voluminous in England, whether necessarily so or not, than is required by the decisions of our courts. The following is suggested, to be modified for the occasion as the pleader will know how: —

That on, &c. at, &c. [setting out the holding of the election and its purpose as at ante, § 384, 385], one X was then and there a legal voter, and his name was duly registered as such, and as such it then and there stood on the voting lists. Whereupon A, &c. not being, and knowing himself not to be, then and there a legal voter [feloniously], wickedly, maliciously,

Desmond, 122 Mass. 12; The State *v.* Gorham, 11 Conn. 233; The State *v.* Boyington, 56 Maine, 512.

[1] And see Stat. Crimes, § 832, 833; ante, § 248, 249.

[2] As to the necessity of this, see Stat. Crimes, § 835, and the cases infra. And see the form ante, § 249.

[3] In one case before me this allegation is, "that he had not, before the said election on the day aforesaid, resided in the Commonwealth one year, and within the said city six months next preceding said day." Commonwealth *v.* Bradford, 9 Met. 268.

[4] The State *v.* Marshall, 45 N. H. 281; People *v.* Standish, 6 Parker C. C. 111; The State *v.* Bruce, 5 Oregon, 68; The State *v.* Moore, 3 Dutcher, 105; Commonwealth *v.* Shaw, 7 Met. 52; Commonwealth *v.* Bradford, supra; Quinn *v.* The State, 35 Ind. 485; The State *v.* Macomber, 7 R. I. 349; and other cases cited ante, § 384.

[5] Crim. Law, I. § 471 and note; Reg. *v.* Bent, 1 Den. C. C. 157, 2 Car. & K. 179, 1 Cox C. C. 356; Reg. *v.* Hogg, 25 U. C. Q. B. 66.

[6] And see, on this question, Stat. Crimes, § 803, 818, 818 *a*, and the places referred to.

[7] Stat. Crimes, § 818 *a*.

and stealthily did then and there present himself, at the place of voting as aforesaid, before one M and one N, who were then and there inspectors of the said election with authority to receive and reject the votes tendered to be cast, and [feloniously], wickedly, maliciously, and falsely represent, state, and affirm to them that he was the said X, who was authorized as aforesaid to vote, and thereupon [feloniously], &c. offered and tendered to the said M and N a vote in due form as though he was, and as being, the said X [which said offered and tendered vote the said M and N, as such inspectors as aforesaid, then and there received [1]]; against the peace, &c.[2]

§ 388. **False Answer.** — Swearing falsely as to one's right to vote is under some of the statutes a species of perjury.[3] Other statutes make the answer not under oath indictable. Under the words "wilfully give any false answer to the selectmen or moderator presiding at any election," the allegations may be, —

That on, &c. at, &c. there was a town meeting of the inhabitants of the said town of, &c. for the election of, &c. presided over by the selectmen of the said town; whereupon A, &c. then and there presented himself before the said selectmen, and, knowing himself not to possess the qualifications of a voter, fraudulently and surreptitiously demanded to have his name inserted on the voters' list of the said town and to be permitted then and there at said election to vote; and, being then and there inquired of by the said selectmen for the purpose of ascertaining and passing upon his said asserted right to vote, whether he had paid any tax assessed upon him within the two years then next preceding in any town or district in this State, he the said A did then and there knowingly and wilfully give to the said question the false answer that he had theretofore paid a tax assessed upon him in the city of, &c. in the county of, &c. within two years next preceding the said election, to wit, the annual tax of the year, &c.; whereas, in truth and in fact, the said A had not paid any such tax so assessed on him within the said two years in the said city of, &c. as he the said A then and there well knew; against the peace, &c.[4]

II. *Offences by Election Officers.*

§ 389. **Malfeasance in Office — (Varying Statutes).** — The offences within this sub-title consist of the differing sorts of mal-

[1] This allegation introduces matter probably not necessary to the offence, but the pleader will choose to insert it when the fact is thus.

[2] For forms see Reg. *v.* Turner, 12 Cox C. C. 313, 4 Eng. Rep. 561; Reg. *v.* Bent, supra; Reg. *v.* Hogg, supra; Reg. *v.* Vaile, 6 Cox C. C. 470; inducing one to personate voter, Reg. *v.* Hague, 9 Cox C. C. 412.

[3] Humphreys *v.* The State, 17 Fla. 381, 383; Dennis *v.* The State, 17 Fla. 389, 390; Burns *v.* People, 5 Lans. 189.

[4] Commonwealth *v.* Shaw, 7 Met. 52. For another form see Reg. *v.* Bowler, Car. & M. 559.

feasance in office which may occur under great varieties of election regulations, in our States and under the government of the United States. The pleader, therefore, should lay before him the particular statutes on which he is proceeding; and consult, in connection with this chapter and the corresponding one in "Statutory Crimes," the title "Malfeasance and Non-feasance in Office." As a specimen form, —

§ 390. **Refusal to Receive Vote.** — Under the Indiana statute making punishable for misdemeanor "any inspector or judge of any election held within this State, who shall knowingly and wilfully, or corruptly, refuse or neglect to receive the vote of any legal voter, at any election held within this State," we have the following, —

That on, &c. at, &c. [setting out the holding of the election and for what as at ante, § 384, 385, 388], and A, &c. [the defendant] was then and there the inspector of said election, and X was then and there one of the electors competent to vote thereat; whereupon the said X, then and there, offering and endeavoring to vote at said election, tendered to the said A who was then and there acting in the said office of inspector as aforesaid, his ballot for said purpose in due form of law; but nevertheless the said A, well knowing these premised facts, did then and there knowingly, wilfully, and corruptly neglect and refuse to receive the said vote of the said X; against the peace, &c.[1]

§ 391. **Other Forms** — may be found at the places cited in the note.[2]

III. *Other Obstructions and Undue Influencing.*

§ 392. **Attempting to prevent from Voting.** — Under a statute to punish "any person who shall attempt or procure, by threats or intimidation, any other person to avoid voting at any town meet-

[1] Bicknell Crim. Pr. 466, 467; referring, for the statute, to Laws Spec. Sess. 1858, p. 40. I have slightly altered and enlarged the words of this form as it stands in Bicknell, to render it more acceptable for general use in our States. For a form for a similar offence in a United States court, see United States *v.* Foster, 4 Hughes, 514. And see Stat. Crimes, § 838.

[2] Against inspector for neglect of duty (form only in part given), Hall *v.* People, 90 N. Y. 498. Against judges of election for neglect of duty, The State *v.* Randles, 7 Humph. 9. Against commissioners of election for malfeasance, United States *v.* Nicholson, 3 Woods, 215. For giving a false certificate of election, United States *v.* Clayton, 2 Dil. 219, 220. Against a constable for not attending an election, 2 Chit. Crim. Law, 265 Irregular holding of election, Rex *v.* Atkins, Trem. P. C. 230, 3 Mod 3, 2 Show. 236; Wyman *v.* Commonwealth, 14 Bush, 466, 469.

ing," the allegations will vary with the facts. For example, they may be, —

That A, &c. on, &c. at, &c. did make an assault on one X, and did then and there beat, bruise, kick, wound, and ill-treat the said X [*or*, did threaten one X, who obtained his livelihood by working for the said A as a journeyman boot-maker, to discharge him from said employment and give him no more work], in order and thereby attempting to procure, by threats and intimidation, the said X, to avoid voting at the annual town meeting of said town of M, the said town meeting being then and there legally and duly held and in session [*or*, did threaten one X, who was then and there a person duly qualified to vote at the annual town meeting of the said town of M, which meeting was then and there being legally and duly held and in session, that he the said A would on the first opportunity horsewhip the said X in some private place, if he then and there voted at said town meeting, intending by said threat to procure the said X not to vote at said town meeting]; against the peace, &c.[1]

§ 393. **Disturbing Election.** — The allegations may be, —

That on, &c. at, &c. [setting out the holding of the election, &c. as at ante, § 384, 385, 388], and A, &c. then and there came into the open meeting where the said election was being had and held, and did then and there, &c. [averring the act of disturbance in the manner shown ante, § 365 et seq.]; against the peace, &c.[2]

§ 394. **Conspiracy against Election.** — One form of obstructing or corrupting an election is through conspiracy. The methods of averment do not differ from those already shown in the chapter on "Conspiracy,"[3] and it will be sufficient here simply to refer to places where forms under the present head appear.[4]

[1] The State *v.* Hardy, 47 N. H. 538. It seems to me best, in general practice, to introduce in some form the allegation that X was a qualified voter; for I can well imagine that some courts will require this. Whatever is held in one State, the question will be a fair one in another, whether it is an offence under a statute in these terms to procure a person to avoid voting who has no right to vote. For other forms under other like statutes, see The State *v.* Franks, 38 Texas, 640; United States *v.* Judges of Elections, 1 Hughes, 493, 494; Train & H. Prec. 185.

[2] For a form see Commonwealth *v.* Hoxey, 16 Mass. 385. And see the form in Rex *v.* Leech, 9 Howell St. Tr. 351. **Riots, Assaults, &c. at Election.** — See forms in Rex *v.* Pilkington, Trem. P. C. 182; Commonwealth *v.* Runnels, 10 Mass. 518; People *v.* White, 55 Barb. 606.

[3] Ante, § 279 et seq.

[4] 7 Cox C. C. App. 15; Rex *v.* Haslam, 1 Den. C. C. 73; United States *v.* Butler, 1 Hughes, 457; United States *v.* Cruikshank, 1 Woods, 308; United States *v.* Goldman, 3 Woods, 187, 189. **In Nature of Conspiracy.** — The following forms may be consulted: for a corrupt agreeing to receive the office of distributor of stamps, on condition of allowing the former possessor to have the profits for life, 3 Chit. Crim. Law, 682. Trafficking in appointments to public offices, 3 Cox

IV. *Betting on Elections.*[1]

§ 395. **Formula.** — The statutory terms creating this offence are so diverse that, as the indictment must cover the particular ones on which it is drawn, there can be for it no general formula which will not leave considerable to be filled in or adapted to fit the individual statute or instance. Still, assuming the offence not to be felony, and so not requiring to be charged as committed "feloniously," the outline may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did unlawfully [*or*, &c. using the statutory word] bet [*or* lay a wager, *or* otherwise as the statutory expression may be] with one X[2] [ante, § 79], (in) the sum of fifty dollars[3] [*or* one suit of clothes of the value[4] of forty dollars], that, at the general State election in this State then next to be held,[5] M [who was then a candidate nominated for the office of governor of the State[6]] would be elected and chosen governor of the State [*or* did win from X by betting, &c. *or* otherwise, following the statute]; against the peace, &c. [ante, § 66–69].[7]

C. C. App. 33; Reg. *v.* Charretie, 3 Cox C. C. 499. Corrupt contract to procure appointment to office, Samo *v.* Reg. 2 Cox C. C. 178.

[1] Stat. Crimes, § 931–949.

[2] The name should be averred. Stat. Crimes, § 944.

[3] It is well to be cautious about this sort of averment. See ante, § 248 and note, 250, note. In Williams *v.* The State, 12 Sm. & M. 58, 63, the learned judge observed: "It is relied upon that, while the indictment charges a bet of money to the amount of two hundred dollars, the evidence shows the bet upon the part of Williams to have been four United States treasury notes, each of the denomination of fifty dollars. . . . This point we deem to be well taken. In legal acceptation, such notes are not money; and, even if the indictment had charged the bet to have been made with them as valuable things, their value must have been proved, to have warranted a conviction." Thacher, J. And see Stat. Crimes, § 874, 875, 901, 920, 921.

[4] Necessary only when as of law affecting the punishment. Stat. Crimes, § 945. See also The State *v.* Bridges, 24 Misso. 353.

[5] There are cases which hold it to be necessary to state the time of the election. Lewellen *v.* The State, 18 Texas, 538. And doubtless this is the correct rule for some circumstances. But where, as in the form in the text, the time is fixed by general law, whereof the court takes judicial cognizance, no just reason can be given why it should be averred otherwise than as in the text.

[6] As to the necessity of this allegation, see Stat. Crimes, § 942, 943. It appears in most of the precedents.

[7] For forms see Stat. Crimes, § 938–940, 944; also, —

Indiana. — Parsons *v.* The State, 2 Ind. 499; Hizer *v.* The State, 12 Ind. 330; Frazee *v.* The State, 58 Ind. 8; The State *v.* Windell, 60 Ind. 300; Wagner *v.* The State, 63 Ind. 250; Caldwell *v.* The State, 63 Ind. 283.

Kentucky. — Commonwealth *v.* Kennedy, 15 B. Monr. 531.

Mississippi. — Miller *v.* The State, 33 Missis. 356.

Missouri. — The State *v.* Ragan, 22 Misso. 459; The State *v.* Bridges, 24 Misso. 353; The State *v.* Smith, 24 Misso. 356.

Pennsylvania. — Sherban *v.* Commonwealth, 8 Watts, 212.

Texas. — Lewellen *v.* The State, 18 Texas, 538.

§ 396. **Lose or Win — (Value).** — On a statute in the words "Every person who shall, by . . . betting at or upon . . . the result of any election, either lose or win any article of value, shall be fined in any sum not less than the value of the article so lost or won, nor exceeding twice the value thereof," [1] the allegations may be, —

That A, &c. on, &c. at, &c. unlawfully won and took from one X twenty-five dollars,[2] by then and there unlawfully betting and wagering the same with him upon the result of a certain election had and held on, &c. in this State, for governor thereof; against the peace, &c.[3]

§ 397. **Bet.** — On a statute to punish one who "shall wager or bet any sum of money, or anything of value, upon any election under the constitution and laws of this State or of the United States," it is a good form to say, —

That A, &c. on, &c. at, &c. did wager and bet one hundred dollars in money [4] [*or* one hat of the value of five dollars,[5] *or* a valuable thing called a hat, *or* suit of clothes [6]] with X, that he the said A would get and receive, at the M precinct, in T county, one hundred votes for the office of clerk of the County Court of said county, for which office he the said A was then and there a candidate,[7] at an election then and there being held under the constitution and laws of this State; against the peace, &c.[8]

§ 398. **Another Form for Betting** — may be, —

That A, &c. on, &c. at, &c. did lay a wager and bet of fifty dollars with one X, that a certain M, who was then and there a candidate nominated for the public office of governor of this State, would, at an election to be held under the constitution and laws of this State, on, &c. be elected governor thereof; against the peace, &c.[9]

[1] For the statute see Wagner *v.* The State, 63 Ind. 250.

[2] Ante, § 395, note.

[3] Caldwell *v.* The State, 63 Ind. 283. And compare with Stat. Crimes, § 885, 938-941, 944, 945, 947; Hizer *v.* The State, 12 Ind. 330.

[4] As to this, see ante, § 395, note; Stat. Crimes, § 901, 939.

[5] This allegation of value would not be necessary but for the special terms of the statute "anything of value." Ante, § 395, note; Stat. Crimes, § 938, 945. Perhaps the court will take judicial cognizance of what is palpable to the non-judicial understanding, that a hat is a "valuable thing." But, in the absence of any decision to this effect, I should deem it safer to put the averment in some form into the indictment.

[6] Stat. Crimes, § 900, 901.

[7] Deemed important in Kentucky, and perhaps also in some other States. Ante, § 395 and note, and places there referred to.

[8] Commonwealth *v.* Kennedy, 15 B. Monr. 531. And see, for a like form on a similar statute, The State *v.* Smith, 24 Misso. 356, 357; The State *v.* Ragan, 22 Misso. 459.

[9] Sherban *v.* Commonwealth, 8 Watts, 212.

V. *Practical Suggestions.*

§ 399. **Duty of Prosecuting Officer.** — There is no duty of a prosecuting officer more urgent, or demanding greater fidelity in its performance, than the prompt, energetic, and intelligent following up to conviction of every offence against the purity of the elections. This multiform wrong is the one great crime which, in a republic, should never be overlooked or forgiven. When laxity herein becomes possible in any large part of our country, hope for the permanency of free institutions dies. And he who herein murders hope deserves, in a just estimation of his offence, whatever the laws may say, the heaviest punishment possible for a government to inflict on the subject. In the frenzy of party strife, the temptation of a prosecuting officer, manipulated by the unprincipled great men of his own party, to overlook an offence committed in the interest of the party, when there is a public opinion declaring the success of the party necessary to the salvation of the country, and the offence indispensable to party success, is immense. He who resists the temptation and does his duty, finds, in his own breast, and he will ultimately find in the public regard, a reward which only a madman would throw away.

§ 400. **Methods.** — There is nothing in methods of prosecution special to this offence. The prosecuting officer should bring learning, industry, and integrity into all his work; and only these, with integrity most carefully erect, are required under the present head.

CHAPTER XXXI.

EMBEZZLEMENT.[1]

§ 401. **Indictment Peculiar and how.** — Alike under the earlier statutes of embezzlement and under most of the modern ones, as commonly interpreted, the indictment is required to be wrought and twisted into such special shape as to charge, in a single count and as one offence, two dissimilar offences, the one statutory and the other at common law. The one of these offences is embezzlement as defined by the statute, and the other is common-law larceny; and the pleader must not omit from his allegations a particle of what belongs to either,[2] — a rule, however, which by statutes passed from time to time has been more or less relaxed.[3] Hence, —

§ 402. **Elements of Indictment.** — In the absence of a relaxing statute, the indictment must charge, in addition to venue and time, that the defendant did feloniously steal, take, and carry away, not so much money, but such and such enumerated coins, bank-bills, chairs, tables, or other articles; stating also the ownership of them, and, as far as the rule in larceny requires, the value.[4] This is the larceny element, charged after the manner of the common law. The other is the statutory element; and the indictment, into which the larceny element is woven, covers the particular statute, like other indictments on statutes.[5] Thus, —

§ 403. **Formula.** — Many of our American statutes are copied

[1] For the direct elucidations of the law of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 318–383; Crim. Proced. II. § 314–343. Collateral, Crim. Law, I. § 567; II. § 1137; Crim. Proced. I. § 61, 397, 423, 449, 480, 645, 1010; Stat. Crimes, § 271, 413. And see Ib. § 417–424. See also LARCENY.

[2] Rex *v.* McGregor, Russ. & Ry. 23, 2 Leach, 4th ed. 932, 3 B. & P. 106.

[3] See, for the fuller explanations, Crim. Proced. II. § 315–320.

[4] Crim. Proced. II. § 697 et seq.

[5] Crim. Proced. I. § 593 et seq.

more or less closely from the English 7 & 8 Geo. 4, c. 29, § 47, now superseded in England by one in slightly different words.[1] So much of the former as will suffice for the present illustration is, "If any clerk or servant . . . shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant," &c. Now, leaving out of view the provisions modifying the common-law requirements for the indictment, and bearing in mind that our statutes differ more or less from this and from one another, and the terms of the particular statute must be covered, we have, —

That A, &c. on, &c. at, &c. being then and there the servant [*or* clerk, *or* agent, using the statutory term] of one X, did [now look at the statute and follow its words; as, for example, if the indictment is on those above quoted] by virtue of his said employment receive and take into his possession one gold coin [we are now on the larceny part] of the coinage of the United States of America called an eagle, of the value[2] of ten dollars[3] [*or*, &c. setting out any other thing or things of which by the statute embezzlement may be committed, in precisely the same manner as in an indictment for the larceny thereof],[4] [of the property of the said X his master[5]], for and in the name and on the account of the said X[6] [follow-

[1] Crim. Law, II. § 322, 323.

[2] The rule in larceny is, that the value of the stolen thing is required to be alleged only when it is an element influencing as of law the punishment. Crim. Proced. II. § 713; Stat. Crimes, § 427. Therefore it is the same in embezzlement.

[3] R. S. of U. S. § 3511. The reader observes that the terms of the above-recited English statute are at this place "any chattel, *money*, or valuable security." But, before the statutes relaxing the rules for the indictment were passed, it was held not to be sufficiently definite to employ therein the word of wide meaning "money" (Crim. Proced. II. § 320, 321); because such method of allegation would not be adequate in larceny, while yet some want of description, it is not certain how much, might be excused by the allegation that the particulars were to the jurors unknown. Crim. Proced. II. § 321, 703–705. And English and American statutes, regulating the procedure, have relaxed this requirement as to "money."

[4] The form, thus far, is a little less plethoric than the ordinary English indictment (Crim. Proced. II. § 333), but there is no just ground to question its sufficiency.

[5] The ownership of the thing embezzled must be alleged. Crim Proced. II. § 320. It is generally done, not here, but in the closing part. This hint may be serviceable in States where such part is not employed, and in forms of the offence for which it is nowhere required.

[6] Under the statute in the text and others in like terms, it is not customary and seems not necessary to allege from whom the embezzled things were received by the defendant. But under some of our American statutes it is necessary. Crim. Proced.

ing here also the statutory terms], and afterward [1] did then and there fraudulently [and feloniously [2]] embezzle [*or*, &c. using the statutory word or expression [3]] the same; and so [returning now to the larceny part] the said A did then and there, in manner and form aforesaid, the said gold coin [*or*, &c. stating whatever else was specified above, but general terms will here, where they are qualified by "said," suffice], the property of the said X his master, from the said X feloniously steal, take, and carry away; against the peace, &c. [ante, § 66–69].[4]

II. § 323 *a*. And then the allegation must be added to those in our formula.

[1] This word "afterward" is in some, not all, of the forms before me. I do not deem it essential; but it renders more distinct the statement of the offence, for which reason I should prefer to use it.

[2] This offence being felony, "feloniously" should be employed in the indictment. But to insert it only in the concluding part has been adjudged sufficient. Crim. Proced. II. § 323. Still its insertion here also is proper; and, in States where the larceny conclusion is not appended, this is the special place for it.

[3] Crim. Proced. II. § 322.

[4] For forms see Archb. Crim. Pl. & Ev. 19th ed. 482, 500, 502, 503, 505, 509; 3 Chit. Crim. Law, 666, 701, 961–971, 992, 993; Rex *v.* Bourne, 4 Went. Pl. 42; 6 Cox C. C. App. 14, 109; 8 Ib. App. 20; Reg. *v.* Harman, 2 Ld. Raym. 1104; Rex *v.* Johnson, 3 M. & S. 539; Rex *v.* Taylor, 3 B. & P. 596, Russ. & Ry. 63; Rex *v.* Higgins, 2 East, 5; Rex *v.* Whittingham, 2 Leach, 4th ed. 912; Rex *v.* Aslett, 2 Leach, 4th ed. 958, Russ. & Ry. 67, 1 N. R. 1; Rex *v.* Johnson, 2 Leach, 4th ed. 1103; Rex *v.* McGregor, Russ. & Ry. 23, 2 Leach, 4th ed. 932, 3 B. & P. 106; Rex *v.* Bakewell, Russ. & Ry. 35; Rex *v.* Crighton, Russ. & Ry. 62; Rex *v.* Mellish, Russ. & Ry. 80; Rex *v.* Hartley, Russ. & Ry. 139; Rex *v.* Beechey, Russ. & Ry. 319; Rex *v.* Burton, 1 Moody, 237; Rex *v.* Nettleton, 1 Moody, 259; Rex *v.* Murray, 1 Moody, 276; Rex *v.* Hughes, 1 Moody, 370; Rex *v.* Jenson, 1 Moody, 434; Reg. *v.* Adey, 1 Den. C. C. 571; Rex *v.* Hawkins, 1 Den. C. C. 584; Reg. *v.* Wortley, 2 Den. C. C. 333, 5 Cox C. C. 382; Reg. *v.* Goodenough, Dears. 210; Reg. *v.* Moah, Dears. 626, 7 Cox C. C. 60; Reg. *v.* Bayley, Dears. & B. 121; s. c. nom. Reg. *v.* Bailey, 7 Cox C. C. 179; Reg. *v.* Tite, Leigh & C. 29, 8 Cox C. C. 458; Reg. *v.* Proud, Leigh & C. 97, 9 Cox C. C. 22; Reg. *v.* Holman, Leigh & C. 177, 9 Cox C. C. 201; Reg. *v.* Fletcher, Leigh & C. 180, 9 Cox C. C. 189; Reg. *v.* Massey, Leigh & C. 206, 9 Cox C. C. 234; Reg. *v.* Glover, Leigh & C. 466, 9 Cox C. C. 500; Reg. *v.* Balls, Law Rep. 1 C. C. 328; Reg. *v.* Cooper, Law Rep. 2 C. C. 123, 125; Reg. *v.* Foulkes, Law Rep. 2 C. C. 150; Reg. *v.* Tatlock, 2 Q. B. D. 157, 13 Cox C. C. 328; Reg. *v.* Lovell, 2 Moody & R. 236; Rex *v.* Becall, 1 Car. & P. 310; Rex *v.* White, 4 Car. & P. 46; Reg. *v.* Purchase, Car. & M. 617; Reg. *v.* Lanauze, 2 Cox C. C. 362; Reg. *v.* Gomm, 3 Cox C. C. 64; Reg. *v.* Murphy, 4 Cox C. C. 101, 104; Reg. *v.* Taffs, 4 Cox C. C 169; Reg. *v.* Woolley, 4 Cox C. C. 251; Reg. *v.* Woolley, 4 Cox C. C. 255; Reg. *v.* Tyrie, 11 Cox C. C. 241; Reg. *v.* Rudge, 13 Cox C. C. 17; Reg. *v.* Graham, 13 Cox C. C. 57; Reg. *v.* Cosser, 13 Cox C. C. 187; Reg. *v.* Fullagar, 14 Cox C. C. 370; Rex *v.* Gourlay, Jebb, 82; Reg. *v.* Hynes, 13 U. C. Q. B. 194; Reg. *v.* Armstrong, 20 U. C. Q. B. 245.

Alabama. — Lowenthal *v.* The State, 32 Ala. 589; Doyle *v.* The State, 49 Ala. 28; Noble *v.* The State, 59 Ala. 73.

Arkansas. — The State *v.* Hunnicut, 34 Ark. 562.

California. — People *v.* Cohen, 8 Cal. 42; People *v.* Peterson, 9 Cal. 313; People *v.* Garcia, 25 Cal. 531; People *v.* Potter, 35 Cal. 110; People *v.* Carrillo, 54 Cal. 63.

Georgia. — Bulloch *v.* The State, 10 Ga. 46; Snell *v.* The State, 50 Ga. 219.

Illinois. — Wright *v.* People, 61 Ill. 382; Goodhue *v.* People, 94 Ill. 37.

Indiana. — The State *v.* Hebel, 72 Ind. 361; The State *v.* Tumey, 81 Ind. 559.

Iowa. — The State *v.* Orwig, 24 Iowa, 102; The State *v.* Foster, 37 Iowa, 404; The State *v.* Stoller, 38 Iowa, 321; The State *v.* Brandt, 41 Iowa, 593, 595; The State *v.* Parsons, 54 Iowa, 405.

Kansas. — The State *v.* Smith, 13 Kan.

§ 404. **Allegation of Thing embezzled.** — As the thing embezzled does not, in the ordinary offence such as is supposed in the last section, pass through the hands of the injured person, and commonly he never had it in them, to require the pleader to set it out as in the indictment for common-law larceny, especially where it consists of parcels of coins and bank-bills whereof practically men take cognizance only in the sums which they aggregate, is almost a denial of justice.[1] Therefore statutes to correct this wrong were long ago passed in England, and they have been adopted with us; and, in both countries since their original enactment, they have been modified and made more liberal. The

274, 277; The State *v.* Graham, 13 Kan. 299; The State *v.* Crosby, 17 Kan. 396.

Kentucky. — Johnson *v.* Commonwealth, 5 Bush, 430.

Louisiana. — The State *v.* Muston, 21 La. An. 442; The State *v.* Thompson, 32 La. An. 796.

Maine. — The State *v.* Hinckley, 38 Maine, 21; The State *v.* Goss, 69 Maine, 22; The State *v.* Haskell, 33 Maine, 127.

Massachusetts. — Commonwealth *v.* Stearns, 2 Met. 343; Commonwealth *v.* Wyman, 8 Met. 247; Commonwealth *v.* Smart, 6 Gray, 15; Commonwealth *v.* Shepard, 1 Allen, 575; Commonwealth *v.* Concannon, 5 Allen, 502; Commonwealth *v.* Tenney, 97 Mass. 50; Commonwealth *v.* Butterick, 100 Mass. 1; Commonwealth *v.* Hussey, 111 Mass. 432; Commonwealth *v.* Smith, 116 Mass. 40; Commonwealth *v.* Bennett, 118 Mass. 443; Commonwealth *v.* Doherty, 127 Mass. 20.

Michigan. — People *v.* McKinney, 10 Mich. 54; People *v.* Donald, 48 Mich. 491.

Minnesota. — The State *v.* Munch, 22 Minn. 67, 68; The State *v.* New, 22 Minn. 76; The State *v.* Butler, 26 Minn. 90; The State *v.* Mims, 26 Minn. 183, 185; The State *v.* Mims, 26 Minn. 191; The State *v.* Ring, 29 Minn. 78, 80.

Missouri. — The State *v.* Mohr, 68 Misso. 303; The State *v.* Heath, 70 Misso. 565, 567.

Montana. — United States *v.* McElroy, 2 Mon. Ter. 494, 497.

Nevada. — The State *v.* Malim, 14 Nev. 288.

New Jersey. — The State *v.* Stimpson, 4 Zab. 9.

New York. — People *v.* Allen, 5 Denio, 76; Coats *v.* People, 4 Parker C. C. 662, 664; Bork *v.* People, 91 N. Y. 5.

North Carolina. — The State *v.* Lanier, 89 N. C. 517.

Ohio. — The State *v.* Newton, 26 Ohio State, 265.

Oregon. — The State *v.* Dale, 8 Oregon, 229.

Pennsylvania. — Commonwealth *v.* Wade, stated 1 Dall. 337; Commonwealth *v.* Newcomer, 13 Wright, Pa. 478; Hutchison *v.* Commonwealth, 1 Norris, Pa. 472; Commonwealth *v.* Leisenring, 11 Philad. 389.

Rhode Island. — The State *v.* Snell, 9 R. I. 112.

Tennessee. — The State *v.* Cameron, 3 Heisk. 78, 81, 82; The State *v.* Henry, 1 Lea, 720.

Texas. — Riley *v.* The State, 32 Texas, 763; Wise *v.* The State, 41 Texas, 139; The State *v.* Longworth, 41 Texas, 162; The State *v.* Brooks, 42 Texas, 62; The State *v.* McLane, 43 Texas, 404; Henderson *v.* The State, 1 Texas Ap. 432, 434; Griffin *v.* The State, 4 Texas Ap. 390; Keeller *v.* The State, 4 Texas Ap. 527; Gaddy *v.* The State, 8 Texas Ap. 127; Reside *v.* The State, 10 Texas Ap. 675.

Wisconsin. — The State *v.* Campbell, 44 Wis. 529.

Wyoming. — McCann *v.* United States, 2 Wy. Ter. 274, 275.

United States. — United States *v.* Forrest, 3 Cranch, C. C. 56; United States *v.* Clark, Crabbe, 584.

[1] Crim. Proced. II. § 319.

practitioner should carefully note what are the provisions on this topic in his own State. They differ in our States, but largely they are in substance the same as now in England; namely, — "Where the offence shall relate to any money or any valuable security [the reader perceives that this does not change the rule as to ordinary chattels], it shall be sufficient to allege the embezzlement, &c. to be of money, without specifying any particular coin or valuable security; and such allegation, as far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled, &c. any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved."[1] Under this provision, a common form of the averment in England is, —

"Certain money to a large amount, to wit, to the amount of ten pounds"[2] [a circumlocution plainly useless. It is equally good in law, while more simple, to say, "ten pounds in money"[3]].

With us, under our Constitutions, which, in varying terms, yet in substance, provide that the accused shall be entitled to have the charge against him plainly and fully set out,[4] there may be doubt whether it is competent for legislation to make punishable a man for one thing on the allegation of another, and whether the statute should not therefore be so interpreted[5] as to avoid this. To forestall the objection[6] it is proposed that the averment be, —

Five hundred dollars in money and such valuable securities as under the statute in that case made and provided may be charged as money.

§ 405. **Three Offences in One Indictment.** — The common-law rule in felony, that, however many counts an indictment may contain, it shall charge but one offence,[7] has been found not to work well in embezzlement. Therefore, as to this offence, it has been variously modified in England and most of our States; a sufficient explanation whereof is given in "Criminal Procedure."[8] The practitioner should carefully note the statutes on this point in his own State. Now, —

[1] 24 & 25 Vict. c. 96, § 71.
[2] Archb. Crim. Pl. & Ev. 19th ed. 482.
[3] Ante, § 250 and note.
[4] Crim. Proced. I. § 86–88, 95–111.
[5] Stat. Crimes, § 89, 90.
[6] The objection in a different form, or rather a different objection, has been, and no doubt correctly, overruled. Crim. Proced. II. § 332; Commonwealth *v.* Bennett, 118 Mass. 443.
[7] Crim. Proced. I. § 449–451, 457.
[8] Ib. II. § 332–334.

§ 406. **Further of Forms.** — With these hints, directions, and formulas, the pleader, laying his own statutes before him, can, on any of them, draw an indictment which will be sure to be good. If he looks further for a precedent and follows it, he may fail. The welfare of the reader, therefore, would probably be best promoted by closing the chapter here. But, as most would not be satisfied with it so, and as the wise can refuse to read further, let us proceed.

§ 407. **Statute differently Expressed.** — Some of our American statutes, while in substance copied from the English ones, are differently expressed, and in ways to require somewhat modified interpretations. Thus, "An officer, agent, clerk, or servant of an incorporated company, or a clerk, agent, or servant of a private person or partnership, except an apprentice or other person under the age of sixteen years, who embezzles or fraudulently converts to his own use, or takes or secretes with intent so to do, without consent of his employer or master, any property of another which has come to his possession or is under his care by virtue of such employment, shall be deemed guilty of simple larceny."[1] And this is accompanied by the provision, that, where the thing embezzled, &c. is "bullion, money, notes, bank-notes, checks, drafts, bills of exchange, obligations, or other securities for money, . . . it shall be sufficient to allege generally in the indictment an embezzlement, &c. of money to a certain amount," &c. substantially as in the English statute.[2] Upon this it will be a good form to say, —

That A, &c. on, &c. at, &c. being the clerk and agent[3] of one X, and not under the age of sixteen years[4] and not an apprentice, did then and there, by virtue of his employment as such clerk and agent, have under his care, of the property of the said X [*or*, of one Y],[5] one sewing-machine of the value of thirty dollars,[6] and five hundred dollars in money [*or* money

[1] Mass. Pub. Stats. c. 203, § 40. Compare with ante, § 403.

[2] Ante, § 404; Mass. Pub. Stats. c. 203, § 44.

[3] Or, "clerk" alone will suffice, or "agent" alone, or "servant" alone.

[4] As I interpret the statute, this form of the negative completely covers the exception. It is not necessary to say "not an apprentice." Crim. Proced. I. § 641; Stat. Crimes, § 1042. But a different meaning seems to be implied in Commonwealth *v.* Smith, 116 Mass. 40, though the point is not adjudged.

[5] The pleader will follow his choice whether or not to allege the ownership here; as, see ante, § 403 and note. And the terms of this statute seem to imply that such ownership may be in a third person as well as in the employer or master.

[6] An article like this, not being within the statute permitting a more general allegation, must be described as in the com-

to the amount of five hundred dollars [1]], consisting of money, bank-notes, and checks,[2] here alleged as money within the provisions of the statute in that case made and provided,[3] and did afterward,[4] then and there, without the consent of the said X, feloniously embezzle the same, and fraudulently and feloniously convert the same to his own use; [5] and so [6] the said A did then and there, in manner and form aforesaid, the said sewing-machine and the said money, of the property of the said X [*or* of the said Y], [from the said X[7]], feloniously steal, take, and carry away; against the peace, &c.[8]

§ 408. **Same in Statutory Form.** — On a statute substantially identical with the one copied into the last section, the following form, which legislation had declared to be sufficient, was sustained by the court: —

That, before the finding of this indictment, A, &c. being the agent or clerk of X, the said X not being an apprentice, or under the age of eighteen years, embezzled, or fraudulently converted to his own use, money to about the amount of eighteen hundred dollars, and a bill of exchange to about the amount of eighteen hundred dollars, which came into his possession by virtue of his employment; against the peace, &c.[9]

mon-law indictment for larceny. Ante, § 401–404.

[1] This form more exactly covers the statutory words, but I think the other means the same thing. Some might choose to say "amount *and value*," but it would be difficult to assign any good reason for this.

[2] See, as to this, ante, § 404. I should use here only such of the statutory terms as are applicable to the facts to be proved.

[3] If the pleader is framing his indictment with reference to this particular statute, there is a part of it, not given in the text, to which I wish to call his attention. It goes on, very singularly, to provide, that, "on the trial, evidence may be given of any such embezzlement, &c. *committed within six months next after the time stated in the indictment*," &c. I shall not undertake to interpret this. Does it mean that, for the prosecuting officer to avail himself of this provision, he must lay the offence as committed before it transpired in fact?

[4] As to this "afterward," see ante, § 403 and note.

[5] This latter clause, "fraudulently," &c. is, of course, not necessary; yet I should prefer to insert it.

[6] There are forms which add here, in varying terms, that by this means the defendant became guilty of larceny. Of which offence, the reader perceives, the statute says he is guilty, — a mere conclusion of law. No mere conclusion of law need be averred. Crim. Proced. I. § 515.

[7] The statute of 7 & 8 Geo. 4, c. 29, § 47, on which the foregoing formula is drawn, provides that the person embezzling the property "shall be deemed to have feloniously stolen the same *from his master*." Hence the words "from the said X" were at this place used in the formula. Ante, § 403. But the terms of the statute on which we are here proceeding are, "shall be deemed guilty of simple larceny." And the indictment for simple larceny does not contain the words "from the said X." Crim. Proced. II. § 697. Therefore they need not be used in the present form.

[8] And see the places cited ante, § 403, note; and particularly, Commonwealth *v.* Bennett, 118 Mass. 443; Commonwealth *v.* Smith, 116 Mass. 40; Commonwealth *v.* Stearns, 2 Met. 343; Johnson *v.* Commonwealth, 5 Bush, 430.

[9] Lowenthal *v.* The State, 32 Ala. 589.

§ 409. **By Public Officers.** — Embezzlements by public officers are punishable under statutes which differ in the respective States, and are not always quite the same in terms with those against private embezzlements. No general form of the indictment for all is possible. A statute now before the writer makes it a penitentiary offence "if any officer of the government, who is by law a receiver or depositary of public money, or any clerk or other person employed about the office of such officer, shall fraudulently take or misapply or convert to his own use any part of such public money, or secrete the same with intent to take, misapply, or convert to his own use, or shall pay or deliver the same to any person knowing that he is not entitled to receive it."[1] There is nothing here about the offence being larceny; and as, if there were, it would still be contrary to just principle to compel the pleader to weave into the indictment on the statute the larceny allegations,[2] *a fortiori* they are not required on this statute. It has been adjudged good to say, —

That on, &c. at, &c. A, &c. who was then and there an officer of the government, to wit, a deputy sheriff in and for the said county of M, and by virtue of his said office then and there by law a receiver of public money, to wit, a collector of taxes assessed in said county of M, and authorized to collect and receive the moneys due the government of the State, and then and there acting in said office, did then and there wickedly, wilfully, unlawfully, feloniously, and fraudulently take and misapply, and convert to his own use, a part of the money entrusted to him as aforesaid, to wit, the sum of one thousand dollars, money collected by him as aforesaid for the State of ——, from the citizens of M county, for the year [specifying it], and also large sums of said taxes for that year to the grand jurors unknown in amount, he the said A then and there well knowing that he was not entitled to the same; against the peace, &c.[3]

[1] The State *v.* Brooks, 42 Texas, 62.

[2] Crim. Proced. II. § 318–320.

[3] The State *v.* Brooks, supra. I have not deemed it necessary to consider what abridgments might be made of these allegations. In The State *v.* Smith, 13 Kan. 274, 277, which was an information against a county treasurer, the form is quite similar, and it was adjudged adequate. "The information," said Kingman, C. J., delivering the opinion of the court, "charges specifically to what fund each portion of the total charged belongs, but does not describe the kinds of moneys embezzled." And counsel had urged that they should have been thus specifically described. The learned judge continues: "In transactions such as are now under consideration, running through a long period of time, and involving large sums of money, received from a whole community, and being constantly changed by the necessities of the office, such a description of the funds is impossible; and, if necessary to be averred, must be proven; and, therefore, is an effectual bar to all prosecutions under the law." After speaking of the rule of the English courts under differently-worded statutes, he proceeds: "We are not forced to discuss the authorities on this point, for

§ 410. **Not Larceny.** — The pleader, therefore, should carry in his mind the distinction between those embezzlements which the statute does not make larceny, and those which it does, — a distinction not always present to the thoughts of counsel and judges as disclosed by the cases. There is no reason why, when the statute is silent as to larceny, the indictment should be drawn otherwise than after the ordinary rules for indictments on statutes.[1] With this distinction in the mind of the pleader, and the foregoing specimens of the indictment before him, —

§ 411. **Other Forms** — may be readily constructed as needed. It would be little else than waste of space to swell this chapter with them. Yet references to some places where other particular forms appear will be useful.[2]

the change in the law neeessarily compels sueh eonstruction of its provisions as will give it effeet. And we do not think that the reason of those decisions, when applied to the agent of private persons who can at all times scrutinize the aets of those in their employ, apply to a publie offieer. The public at large can exercise no eonstant supervision over his aets, nor can it, like a private individual, assume the direct eustody of the funds at any moment. The proper authorities may require him to aeeount, may examine the funds in his possession, but in the next hour all these funds may be ehanged, long before the act of embezzlement is done, or the intent is formed. To suppose that the legislature, when they added the large class of publie officers to those who might be amenable to the law for the offence of embezzlement, intended to require proof of the identity of the money embezzled, or a deseription of it, and from whom it was received, is to infer that they intended to enact a law the enforcement of which would be impossible. It will not do to permit an artificial rule of pleading, having a doubtful foundation in reason, to lead to such a disastrous result. This exact point has been decided in Michigan in a very able opinion (People *v.* McKinney, 10 Mich. 54), and we but follow that decision in holding that the information is not defective in not describing precisely the funds embezzled." p. 295, 296. For other forms of the indictment for embezzlement by a publie offieer, under various statutes, see Bork *v.* People, 91 N. Y. 5; The State *v.* Hebel, 72 Ind. 361; People *v.* McKinney, 10 Mich. 54; The State *v.* Graham, 13 Kan. 299; The State *v.* Parsons, 54 Iowa, 405; The State *v.* Brandt, 41 Iowa, 593, 595; The State *v.* Goss, 69 Maine, 22; The State *v.* Ring, 29 Minn. 78, 80; Reg. *v.* Moah, Dears. 626, 7 Cox C. C. 60.

[1] For the rules see Crim. Proced. I. § 593 et seq.

[2] For embezzlement by a common earrier, The State *v.* Hinckley, 38 Maine, 21. Embezzlement of promissory notes delivered to the defendant to keep and return, Commonwealth *v.* Hussey, 111 Mass. 432. Against a bill broker for embezzling a bill delivered to be discounted, 3 Chit. Crim. Law, 967. Note entrusted for special purpose, Reg. *v.* Hynes, 13 U. C. Q. B. 194. Bonds, Commonwealth *v.* Tenney, 97 Mass. 50. Bank-book, Commonwealth *v.* Doherty, 127 Mass. 20. Exchequer bills, 3 Chit. Crim Law, 968. Various securities, Reg. *v.* Cooper, Law Rep. 2 C. C. 123, 125; 3 Chit. Crim. Law, 965, 966. Funds of a benefit society, Reg. *v.* Taffs, 4 Cox C. C. 169; Reg. *v.* Woolley, 4 Cox C. C. 251; Reg. *v.* Woolley, 4 Cox C. C. 255; Reg. *v.* Proud, Leigh & C. 97, 9 Cox C. C. 22; Reg. *v.* Tyrie, 11 Cox C. C. 241. By a bank officer, Commonwealth *v.* Shepard, 1 Allen, 575. Against trustee of savings bank, Reg. *v.* Fletcher, Leigh & C. 180, 9 Cox C. C. 189. Against servant, People *v.* Garcia, 25 Cal. 531. Guardian, The State *v.* Henry, 1 Lea, 720. Trustee, Reg. *v.* Fullagar, 14 Cox C. C. 370. Bailee of

§ 412. **Solicitations** — and other attempts at embezzlement are, of course, indictable under the general law of attempt. And we have seen what are the proper forms for the indictment.[1] It has been adjudged good for the solicitation to say, —

That A, &c. on, &c. at, &c. "did falsely, wickedly, and unlawfully solicit and incite one X, a servant of Y, to take, embezzle, and steal a quantity of twist, of the value of, &c. of the goods and chattels of his master Y aforesaid;" against the peace, &c.[2]

coin and gold-dust, People *v.* Peterson, 9 Cal. 313. Warehouseman embezzling grain, The State *v.* Stoller, 38 Iowa, 321. Commission merchant embezzling proceeds of sale, Wright *v.* People, 61 Ill. 382; Reg. *v.* Harman, 2 Ld. Raym. 1104.

[1] Ante, § 100–107, 110, 111.

[2] Rex *v.* Higgins, 2 East, 5. For other forms, see 3 Chit. Crim. Law, 992, 993.

For EMBRACERY, see OBSTRUCTING JUSTICE, &c.
ENDEAVORS, see ante, § 100–112.
ENGROSSING, see Crim. Proced. II. § 348–350.
ENTICING, see ante, § 105–107, 114, 116, 117.
ENTRY, FORCIBLE, see FORCIBLE ENTRY, &c.
ESCAPE, see PRISON BREACH, &c.
ESTRAY ANIMALS, see ante, § 176.
EXPOSING DEPENDENT PERSON, see NEGLECTS.
EXPOSURE OF PERSON, see NUISANCE.

CHAPTER XXXII.

EXTORTION.[1]

§ 413. **Extortion** — is a species of Malfeasance in Office ; and, as such, it might well be relegated to the chapter further on. But, because it is commonly treated as a separate offence, the pleader will be better served by giving its forms here, where he will first look for them.

§ 414. **Common Form — (Constable).** — The following is a common English form for extortion by a constable : —

That A, &c. on, &c. at, &c. being then and there one of the constables of the said parish,[2] did take and arrest one X, by color of a certain warrant, commonly called a bench warrant, which he the said A then and there alleged to be in his possession ; and that the said A afterwards, and whilst the said X so remained in his custody as aforesaid [to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid [3]], unlawfully, corruptly, deceitfully, extorsively, and by color of his said office, did extort, receive, and take of and from the said X the sum of five shillings, as and for a fee due to him the said A as such constable as aforesaid, for the obtaining and discharging of the said warrant, as he the said A then and there alleged ; whereas, in truth and in fact, no fee whatever was then due from the said X to the said A, as such constable as aforesaid in that behalf ; [in contempt of our said Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending,[4] and] against the peace, &c.[5]

§ 415. **Formula.** — The indictment will vary with the office, with the special facts ; and, when on a statute, with its terms.

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 390–408 ; Crim. Proced. II. § 357–364. Incidental, Crim. Law, I. § 573, 587, 715 ; Crim. Proced. I. § 469 ; Stat. Crimes, § 159, note, 171, note, 217, 346, note. And consult MALFEASANCE AND NON-FEASANCE IN OFFICE — THREATENING LETTERS, &c.

[2] I have omitted from this introduction a few useless words.

[3] "Then and there" would be an ample substitute for all this matter in brackets.

[4] Needless. Ante, § 48 ; Crim. Proced. I. § 647.

[5] Archb. Crim. Pl. & Ev. 10th ed. 581, 19th ed. 891.

An outline of its allegations is given in "Criminal Procedure."[1] The formula may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], being a deputy of M the sheriff of said county [*or*, &c. setting out the office according to the fact], and then and there having taken into and keeping in his custody as such deputy sheriff the body of one X [ante, § 78, 79] by him the said A arrested and held under and by virtue of, &c. [specifying the authority; *or*, in other apt terms, stating according to the fact some condition of things which gave opportunity for the extortion and rendered it legally possible], did corruptly, deceitfully, fraudulently, extorsively, and by color of his said office demand and receive of and from the said X twenty dollars, as and for a fee due him the said A from the said X for, &c. [saying for what]; whereas, in truth and in fact, there was then and there no fee due the said A from the said X [*or*, the fee due to the said A from the said X was, for the services aforesaid, *or* otherwise specifying for what,[2] nine dollars and fifty-one cents and no more]; against the peace, &c. [ante, § 65–69].[3]

§ 416. **Upon Statute — (County Treasurer).** — The indictment upon the Indiana statute may be, for example, —

That A, &c. on, &c. at, &c. being the treasurer of the said county of M, did then and there corruptly, unlawfully, extorsively, and by color of his said office extort, demand, and receive of and from one X thirty-five cents as and for a fee due from the said X to him the said A as such treasurer, for making distress and sale of the said X's goods and chattels in payment

[1] Crim. Proced. II. § 357.

[2] Crim. Proced. II. § 358, 359.

[3] For other forms see 2 Chit. Crim. Law, 293–301, 550; 4 Went. Pl. 146; Rex *v.* Norton, 4 Went. Pl. 147; Rex *v.* Broughton, Trem. P. C. 111; Rex *v.* Johnson, Trem. P. C. 119; Rex *v.* Newman, Trem. P. C. 123; Reg. *v.* Atkinson, 11 Mod. 79; Reg. *v.* Badger, 6 Ellis & B. 137.

Arkansas. — Leeman *v.* The State, 35 Ark. 438.

Georgia. — Oliveira *v.* The State, 45 Ga. 555.

Indiana. — The State *v.* Coggswell, 3 Blackf. 54; Emory *v.* The State, 6 Blackf. 106; The State *v.* Moore, 1 Ind. 548; The State *v.* Burton, 3 Ind. 93.

Massachusetts. — Commonwealth *v.* Shed, 1 Mass. 227; Commonwealth *v.* Cony, 2 Mass. 523.

Minnesota. — The State *v.* Brown, 12 Minn. 490.

Montana. — Territory *v.* McElroy, 1 Mon. Ter. 86.

New Hampshire. — The State *v.* Andrews, 51 N. H. 582.

New Jersey. — Halsey *v.* The State, 1 Southard, 324; The State *v.* Maires, 4 Vroom, 142.

Oregon. — The State *v.* Perham, 4 Oregon, 188.

Pennsylvania. — Commonwealth *v.* Evans, 13 S. & R. 426.

Tennessee. — The State *v.* Fields, Mart. & Yerg. 137.

Texas. — Smith *v.* The State, 10 Texas Ap. 413.

Wyoming. — McCarthy *v.* Territory, 1 Wy. Ter. 311.

United States. — United States *v.* Marks, 2 Abb. U. S. 531, 536; United States *v.* More, 3 Cranch, 159; United States *v.* Jackson, 3 Saw. 59.

of taxes by the said X owing to the State and county; whereas, in truth and in fact, no distress and no sale of such goods and chattels for such purpose had been made, and no fee was then due from the said X to the said A; against the peace, &c.[1]

§ 417. **Other Forms** — may be readily constructed from the foregoing, or found in the places referred to in the note to the formula.[2]

[1] The State *v.* Burton, 3 Ind. 93. And compare with Reg. *v.* Atkinson, 11 Mod. 79; 2 Chit. Crim. Law, 300.

[2] Ante, § 415.

For FALSE IMPRISONMENT, see KIDNAPPING, &c.
FALSE NEWS, see ante, § 310; Crim. Law, I. § 472–478, 540.
FALSE PERSONATION, see FALSE PRETENCES.

CHAPTER XXXIII.

FALSE PRETENCES.[1]

§ 418. **Not Complicated — (What Forms needed).** — The offence of Cheating by False Pretences, as distinguished from "Cheats at Common Law," is purely statutory. But the statutes, while presenting verbal differences, are nearly uniform in substance; the elements of the wrong are simple and few; and, though the facts of now and then a case can be set out only in many words, no two cases of this sort are identical, and no help can come to the pleader from preserving for him in a book of precedents what he will never have occasion to use. Or, if the facts should repeat themselves, he could better write them down without the form than with it. So that the outlines of the indictment, showing the allegations which remain the same through the infinite shiftings of facts, are all that will be required for this chapter. The girl who copies her correspondence from a "Complete Letter-writer" is wise in comparison with the pleader who would use more were it furnished him.

§ 419. **How the Indictment.** — The substantial allegations are, that the defendant employed, with another person, such and such false pretences, which are specified; that they were false;[2] that he knew them to be false, and this whether[3] the statutory words

[1] For the direct elucidations of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 409–488; Crim. Proced. II. § 162–198. Incidental, Crim. Law, I. § 110, 257, 369, 438, 468, 571, 586, 587, 633, 686, 758, 815; II. § 152–155, 583; Crim. Proced. I. § 53, 397, 449, 468; Stat. Crimes, § 133, 134, 231. And compare with CHEATS AT COMMON LAW.

[2] Rex *v.* Perrott, 2 M. & S. 379; Crim. Law, II. § 471.

[3] Crim. Proced. II. § 172. I am not certain of the universality of the proposition, that, for an indictment to be good, it must allege the defendant's knowledge of the falsity of the pretences. If, *prima facie*, from the facts set out in it, knowledge may be presumed, does it not disclose a *prima facie* offence, though it does not say in words that the defendant knew? There are, in the books, forms assumed to be good, not in terms averring knowledge. For example, Reg. *v.* Bull, 13 Cox C. C. 608; The State *v.* Call, 48 N. H. 126; The State *v.* Boon, 4 Jones, N. C. 463. Still, the judicious pleader will not intentionally, in any case, omit this allegation.

are so or not; that he got of another certain things of value, which must be particularized, and must be within the statutory inhibition; and that the pretences were the moving cause whereby the things were obtained. The phraseology of the statute must be followed, as in other indictments on statutes; and, where the offence is felony, the word "feloniously" should be used, whether it is in the statute or not.[1]

§ 420. **Formula.** — The allegations which, when not covering the statutory terms, must be modified until they do cover them, may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], [feloniously devising and intending to cheat and defraud one X [2]], did then and there falsely and feloniously [3] pretend [look at the statute and follow its words [4]] to the said X, that one M was desirous of borrowing of him the said X a certain gun, and that he the said A was a messenger from said M authorized and required to bring it to the said M [5] [*or*, &c. setting out any other false pretence acccording to the special fact, and adding, coupled by *and*, as many other not-repugnant false pretences as the pleader chooses [6]]; by means of which false pretences he the said A did then and there fraudulently [and feloniously] obtain of the said X, of the property [*or*, goods and chattels, &c. as the expression is in the statute] of the said X,[7] the said gun [*or*, &c. setting out, in like manner, any other things obtained [8]], of the value of, &c.;[9] whereas, in truth and in fact, the said M was not then desirous of borrowing the said or [10] any other gun of the said X, and the said X was not then and there a messenger from said M authorized and required to bring it to him [*or*, whatever the false pretences were, negative them after this manner [11]], all of which the said X then and there well knew; against the peace, &c. [ante, § 65–69].[12]

[1] Crim. Proced. II. § 163, 165, 168, 172, 173, 175, 176, 179–182.

[2] Necessary only if the expression is in the statute, in which case follow the statutory terms. Crim. Proced. II. § 182; Hamilton *v.* Reg. 2 Cox C. C. 11, 16.

[3] "Feloniously" to be used only if in the statute, or if the offence is felony. Ante, § 206, note.

[4] For example, 30 Geo. 2, c. 24, § 1, had also the words "knowingly and designedly." On such a statute the allegation should be "did knowingly and designedly, falsely," &c.

[5] Crim. Proced. II. § 165, 173, 174, 177.

[6] Ante, § 19–21; Crim. Proced. II. § 170, 171.

[7] The allegation of ownership, as in larceny, is essential. Crim. Proced. II. § 173; The State *v.* Lathrop, 15 Vt. 279.

[8] Crim. Proced. II. § 173; post, § 423 and note.

[9] The allegation of value is necessary only under a statute making value an element in the punisbment. Crim. Proced. II. § 177.

[10] "Or," instead of "and," proper in negative averments. Ante, § 97, note, and the places there referred to.

[11] Further as to which see Crim. Proced. II. § 168.

[12] For forms see Archb. Crim. Pl. & Ev. 10th ed. 289, 19th ed. 513, 532; 3 Chit. Crim. Law, 1003–1021; 4 Ib. 2; 4 Went. Pl. 55, 78, 79; 2 Cox C. C. App. 6; 3 Ib. App. 49; 4 Ib. 3, 33, 41, 45; 5 Ib. App. 51, 53, 79, 90; 6 Ib. App. 46–62, 94, 138,

§ 421. **Authorized by Statute.** — Legislative ingenuity has not devised a form for alleging this offence more compact or other-

157; 7 Ib. App. 24; 8 Ib. App. 17; 11 Ib. App. 11; Rex *v.* Story, Russ. & Ry. 81; Rex *v.* Freeth, Russ. & Ry. 127; Rex *v.* Hill, Russ. & Ry. 190; Rex *v.* Tannet, Russ. & Ry. 351; Rex *v.* Flint, Russ. & Ry. 460; Rex *v.* Goodhall, Russ. & Ry. 461; Rex *v.* Yates, 1 Moody, 170; Rex *v.* Douglas, 1 Moody, 462; Rex *v.* Parker, 2 Moody, 1; Reg. *v.* Henderson, 2 Moody, 192, Car. & M. 328; Reg. *v.* Johnston, 2 Moody, 254; Reg. *v.* Abbott, 1 Den. C. C. 273, 2 Car. & K. 630, 2 Cox C. C. 430; Reg. *v.* Brown, 1 Den. C. C. 291, 299, 2 Car. & K. 504, 3 Cox C. C. 127; Reg. *v.* Leonard, 1 Den. C. C. 304, 2 Car. & K. 514, 3 Cox C. C. 284; Reg. *v.* Boulton, 1 Den. C. C. 508, 2 Car. & K. 917, 3 Cox C. C. 576; Reg. *v.* Coulson, 1 Den. C. C. 592, 4 Cox C. C. 227; Reg. *v.* Kealey, 2 Den. C. C. 68, 70, 5 Cox C. C. 193; Reg. *v.* Welman, Dears. 188, 6 Cox C. C. 153; Reg. *v.* Garrett, Dears. 232; Reg. *v.* Hewgill, Dears. 315; Reg. *v.* Eagleton, Dears. 376, 515; Reg. *v.* Archer, Dears. 449, 6 Cox C. C. 515; Reg. *v.* Oates, Dears. 459, 6 Cox C. C. 540; Reg. *v.* Burgon, Dears. & B. 11, 14; Reg. *v.* Gardner, Dears. & B. 40; Reg. *v.* Keighley, Dears. & B. 145, 7 Cox C. C. 217; Reg. *v.* Mills, Dears. & B. 205, 7 Cox C. C. 263; Reg. *v.* Danger, Dears. & B. 307, 309, 7 Cox C. C. 303; Reg. *v.* Watson, Dears. & B. 348, 7 Cox C. C. 364, 369; Reg. *v.* Godfrey, Dears. & B. 426, 7 Cox C. C. 392; Reg. *v.* Fry, Dears. & B. 449, 7 Cox C. C. 394; Reg. *v.* West, Dears. & B. 575, 8 Cox C. C. 12; Reg. *v.* Butcher, Bell C. C. 6, 8 Cox C. C. 77; Reg. *v.* Goss, Bell C. C. 208, 8 Cox C. C. 262; Reg. *v.* Burnsides, Bell C. C. 282, 8 Cox C. C. 370; Reg. *v.* Moseley, Leigh & C. 92; Reg. *v.* Kerrigan, Leigh & C. 383, 9 Cox C. C. 441; Reg. *v.* Lee, Leigh & C. 309, 9 Cox C. C. 304; Reg. *v.* Lee, Leigh & C. 418, 9 Cox C. C. 460; Reg. *v.* Henshaw, Leigh & C. 444; Reg. *v.* Bulmer, Leigh & C. 476, 9 Cox C. C. 492; Reg. *v.* Giles, Leigh & C. 502, 10 Cox C. C 44; Reg. *v.* Naylor, Law Rep. 1 C. C. 4, 10 Cox C. C. 149; Reg. *v.* Martin, Law Rep. 1 C. C. 56, 10 Cox C. C. 383; Reg. *v.* Hazelton, Law Rep. 2 C. C. 134, 13 Cox C. C. 1; Rex *v.* Airey, 2 East, 30; Rex *v.* Perrott, 2 M. & S. 379; Reg. *v.* Wickham, 10 A. & E. 34; Hamilton *v.* Reg. 9 Q. B. 271, 2 Cox C. C. 11 (same form in Reg. *v.* Hamilton, 1 Cox C. C. 244, 245); Reg. *v.* Bowen, 13 Q. B. 790; Sill *v.* Reg. 1 Ellis & B. 553, Dears. 132; Reg. *v.* Cooper, 1 Q. B. D. 19, 13 Cox C. C. 123; Reg. *v.* Foster, 2 Q. B. D. 301, 13 Cox C. C. 393; Reg. *v.* Cooper, 2 Q. B. D. 510, 13 Cox C. C. 617; Rex *v.* Douglass, 1 Camp. 212; Rex *v.* Plestow, 1 Camp. 494; Rex *v.* Evans, 5 Car. & P. 553; Rex *v.* Reed, 7 Car. & P. 848; Reg. *v.* Tully, 9 Car. & P. 227; Reg. *v.* Copeland, Car. & M. 516; Reg. *v.* Bloomfield, Car. & M. 537; Reg. *v* Philpotts, 1 Car. & K. 112; Reg. *v.* Dent, 1 Car. & K. 249, 251, note; Reg. *v.* Cooke, 1 Fost. & F. 64; Reg. *v.* Franklin, 4 Fost. & F. 94; Reg. *v.* Ward, 1 Cox C. C. 101; Reg. *v.* Gruby, 1 Cox C. C. 249; Reg. *v.* Molony, 2 Cox C. C. 171; Reg. *v.* Bates, 3 Cox C. C. 201; Reg. *v.* Brown, 2 Cox C. C. 348; Reg. *v.* Bowen, 3 Cox C. C. 483; Reg. *v.* Baroisse, 5 Cox C. C. 559; Reg. *v.* Bailey, 6 Cox C. C. 29; Reg. *v.* Partridge, 6 Cox C. C. 182; Reg. *v.* Smith, 6 Cox C. C. 314; Reg. *v.* Jones, 6 Cox C. C. 467; Latham *v.* Reg. 9 Cox C. C. 516; Reg. *v.* Carter, 10 Cox C. C. 645; Reg. *v.* Hunter, 10 Cox C. C. 642; Reg. *v.* Steels, 11 Cox C. C. 5; Reg. *v.* Davis, 11 Cox C. C. 181; Reg. *v.* Garland, 11 Cox C. C. 224, 225; Reg. *v.* Meakin, 11 Cox C. C. 270; Reg. *v.* Lake, 11 Cox C. C. 333; Reg *v.* Hensler, 11 Cox C. C. 570; Reg. *v.* Howarth, 11 Cox C. C. 588; Reg. *v.* James, 12 Cox C. C. 127; Reg. *v.* English, 12 Cox C. C. 171; Reg. *v.* Lince, 12 Cox C. C. 451; Reg. *v.* John, 13 Cox C. C. 100, 107; Reg. *v.* Murphy, 13 Cox C. C. 298; Reg. *v.* Bull, 13 Cox C. C. 608; Reg. *v.* Knight, 14 Cox C. C. 31; Reg. *v.* Kelleher, 14 Cox C. C. 48; Reg. *v.* Jarman, 14 Cox C. C. 111; Reg. *v.* Larner, 14 Cox C. C. 497; Rex *v.* Keefe, Jebb, 6; Rex *v.* Fitzmaurice, Jebb, 29; Reg. *v.* Davis, 18 U. C. Q. B. 180; Reg. *v.* Campbell, 18 U. C. Q. B. 413; Reg. *v.* Dessauer, 21 U. C. Q. B. 231; Reg. *v.* McQuarrie, 22 U. C. Q. B. 600.

Alabama. — Oliver *v.* The State, 37 Ala. 134; Clay *v.* The State, 43 Ala. 350; Langford *v.* The State, 45 Ala. 26; Edwards *v.* The State, 49 Ala. 334; Franklin *v.* The

wise better than the common-law rules present. Following the outline provided in the Alabama code we have, —

State, 52 Ala. 414; Colly *v.* The State, 55 Ala. 85; Sandy *v.* The State, 60 Ala. 58; Daniel *v.* The State, 61 Ala. 4; Mack *v.* The State, 63 Ala. 138.

Arkansas. — The State *v.* Hand, 1 Eng. 165; McKenzie *v.* The State, 6 Eng. 594; Burrow *v.* The State, 7 Eng. 65; The State *v.* Vandimark, 35 Ark. 396; Johnson *v.* The State, 36 Ark. 242; Treadaway *v.* The State, 37 Ark. 443.

Connecticut. — The State *v.* Penley, 27 Conn. 587; The State *v.* Pritchard, 35 Conn. 319; The State *v.* Jackson, 39 Conn. 229.

Florida. — Hamilton *v.* The State, 16 Fla. 288; Ladd *v.* The State, 17 Fla. 215, 217.

Illinois. — Thomson *v.* People, 24 Ill. 60; Morton *v.* People, 47 Ill. 468 Rainforth *v.* People, 61 Ill. 365.

Indiana. — The State *v.* Smith, 8 Blackf. 489, 490; The State *v.* Magee, 11 Ind. 154; The State *v.* Orvis, 13 Ind. 569; The State *v.* Pryor, 30 Ind. 350; Maley *v.* The State, 31 Ind. 192; Todd *v.* The State, 31 Ind. 514, 516; Leobold *v.* The State, 33 Ind. 484; The State *v.* Locke, 35 Ind. 419; Halley *v.* The State, 43 Ind. 509; Jones *v.* The State, 50 Ind. 473; Keller *v.* The State, 51 Ind. 111; Clifford *v.* The State, 56 Ind. 245, 246; The State *v.* Timmons, 58 Ind. 98; Bonnell *v.* The State, 64 Ind. 498; The State *v.* Snyder, 66 Ind. 203 Perkins *v.* The State, 67 Ind. 270; Miller *v.* The State, 73 Ind. 88; Shaffer *v.* The State, 82 Ind. 221, 222; Strong *v.* The State, 86 Ind. 208.

Iowa. — The State *v.* Webb, 26 Iowa, 262; The State *v.* Dowe, 27 Iowa, 273; The State *v.* Joaquin, 43 Iowa, 131; The State *v.* Anderson, 47 Iowa, 142; The State *v.* Quinn, 47 Iowa, 368; The State *v.* McConkey, 49 Iowa, 499; The State *v.* House, 55 Iowa, 466; The State *v.* Montgomery, 56 Iowa, 195.

Kansas. — The State *v.* Snyder, 20 Kan. 306; The State *v.* Cowdin, 28 Kan. 269.

Kentucky. — Commonwealth *v.* Haughey, 3 Met. Ky. 223; Glackan *v.* Commonwealth, 3 Met. Ky. 232.

Maine. — The State *v.* Mills, 17 Maine, 211; The State *v.* Philbrick, 31 Maine, 401; The State *v.* Paul, 69 Maine, 215; The State *v.* Hill, 72 Maine, 238.

Massachusetts. — Commonwealth *v.* Wilgus, 4 Pick. 177; Commonwealth *v.* Call, 21 Pick. 515; Commonwealth *v.* Stone, 4 Met. 43; Commonwealth *v.* Harley, 7 Met. 462; Commonwealth *v.* Strain, 10 Met. 521; Commonwealth *v.* Hulbert, 12 Met. 446; Commonwealth *v.* Davidson, 1 Cush. 33; Commonwealth *v.* Morrill, 8 Cush. 571; Commonwealth *v.* Nason, 9 Gray, 125; Commonwealth *v.* Lannan, 1 Allen, 590; Commonwealth *v.* Goddard, 4 Allen, 312; Commonwealth *v.* Jeffries, 7 Allen, 548; Commonwealth *v.* Lincoln, 11 Allen, 233; Commonwealth *v.* Norton, 11 Allen, 266; Jeffries *v.* Commonwealth, 12 Allen, 145; Commonwealth *v.* Connolly, 97 Mass. 591; Commonwealth *v.* Hooper, 104 Mass. 549; Commonwealth *v.* Dean, 110 Mass. 64; Commonwealth *v.* Hutchison, 114 Mass. 325; Commonwealth *v.* Coe, 115 Mass. 481; Commonwealth *v.* Parmenter, 121 Mass. 354; Commonwealth *v.* Ashton, 125 Mass 384; Commonwealth *v.* Stevenson, 127 Mass. 446; Commonwealth *v.* Harkins, 128 Mass. 79; Commonwealth *v.* Howe, 132 Mass. 250.

Michigan. — People *v.* Winslow, 39 Mich. 505; People *v.* Cline, 44 Mich. 290; Higler *v.* People, 44 Mich. 299, 300, note; People *v.* Pray, 1 Mich. N. P. 69; People *v.* Sumner, 1 Mich. N. P. 214.

Minnesota. — The State *v.* Benson, 28 Minn. 424; The State *v.* Gray, 29 Minn. 142.

Mississippi. — Bowler *v.* The State, 41 Missis. 570.

Missouri. — The State *v.* Evers, 49 Misso. 542; The State *v.* Saunders, 63 Misso. 482, 483; The State *v.* Vorback, 66 Misso. 168, 171; The State *v.* Bradley, 68 Misso. 140; The State *v.* Smallwood, 68 Misso. 192; The State *v.* Fancher, 71 Misso. 460; The State *v.* Porter, 75 Misso. 171, 172.

New Hampshire. — The State *v.* Call, 48 N. H. 126.

New Jersey. — The State *v.* Tomlin, 5 Dutcher, 13; The State *v.* Blauvelt, 9 Vroom, 306.

New York. — People *v.* Stone, 9 Wend. 181; People *v.* Gates, 13 Wend. 311; People *v.* Clough, 17 Wend. 351; People *v.* Williams, 4 Hill, N. Y. 9; Fenton *v.*

That, before the finding of this indictment, A, &c. did falsely pretend to X and Y, who were at the time members of a mercantile firm of the name and style of X & Y, with intent to defraud, that he had satisfied a certain deed of trust which M had or held upon the said A's cotton crop, and that the said M had directed and given authority to him the said A to receive from the said X and Y the proceeds of said cotton crop, which was then in their hands, and by means of such false pretence obtained from the said X and Y the sum of sixty-five dollars in money; against the peace, &c.[1]

§ 422. **At Common Law, Shorter — (By Counterfeit Coin).** — Under the common-law rules, a somewhat, though not greatly, briefer expression of the idea than the foregoing, changing, probably for the better, the order of the allegations (the foregoing following the common order), was employed in a late case and adjudged adequate. It is, —

That A, &c. on, &c. at, &c. [devising and intending to cheat and defraud one X of his goods, money, and property [2]], unlawfully, knowingly, and

People, 4 Hill, N. Y. 126; People *v.* Crissie, 4 Denio, 525; Smith *v.* People, 47 N. Y. 303; People *v.* Blanchard, 90 N. Y. 314, 315; Webster *v.* People, 92 N. Y. 422; People *v.* Hale, 1 Wheeler Crim. Cas. 174; People *v.* Conger, 1 Wheeler Crim. Cas. 448; Skiff *v.* People, 2 Parker C. C. 139; People *v.* Chandler, 4 Parker C. C. 231; People *v.* Sully, 5 Parker C. C. 142; People *v.* Smith, 5 Parker C. C. 490; People *v.* Cooke, 6 Parker C. C. 31; People *v.* Stetson, 4 Barb. 151; People *v.* Higbie, 66 Barb. 131; Clark *v.* People, 2 Lans. 329; People *v.* Chandler, 1 Bnf. 560, 561.

North Carolina. — The State *v.* Fitzgerald, 1 Dev. & Bat. 408; The State *v.* Boon, 4 Jones, N. C. 463; The State *v.* Pickett, 78 N. C. 458; The State *v.* Munday, 78 N. C. 460; The State *v.* Lambeth, 80 N. C. 393; The State *v.* Holmes, 82 N. C. 607; The State *v.* Reese, 83 N. C. 637; The State *v.* Eason, 86 N. C. 674; The State *v.* Dickson, 88 N. C. 643.

Ohio. — Norris *v.* The State, 25 Ohio State, 217; Ellars *v.* The State, 25 Ohio State, 385; Baker *v.* The State, 31 Ohio State, 314; Kennedy *v.* The State, 34 Ohio State, 310; Redmond *v.* The State, 35 Ohio State, 81.

Pennsylvania. — Commonwealth *v.* Henry, 10 Harris, Pa. 253.

South Carolina. — The State *v.* Wilson, 2 Mill, 135; Middleton *v.* The State, Dudley, S. C. 275.

Tennessee. — Jim *v.* The State, 8 Humph. 603; Britt *v.* The State, 9 Humph. 31; The State *v.* De Hart, 6 Baxter, 222; Wallace *v.* The State, 2 Lea, 29, 30; Moulden *v.* The State, 5 Lea, 577; Canter *v.* The State, 7 Lea, 349.

Texas. — The State *v.* Vickery, 19 Texas, 326; Tomkins *v.* The State, 33 Texas, 228; Burd *v.* The State, 39 Texas, 509; Johnson *v.* The State, 41 Texas, 65; The State *v.* Dyer, 41 Texas, 520; The State *v.* Levi, 41 Texas, 563; Washington *v.* The State, 41 Texas, 583; Martin *v.* The State, 1 Texas Ap. 586, 587; Marwilsky *v.* The State, 9 Texas Ap. 377; Mathews *v.* The State, 10 Texas Ap. 279; Stringer *v.* The State, 13 Texas Ap. 520.

Vermont. — The State *v.* Bacon, 7 Vt. 219; The State *v.* Sumner, 10 Vt. 587; The State *v.* Lathrop, 15 Vt 279.

Virginia. — Commonwealth *v.* Swinney, 1 Va. Cas. 146, 150.

West Virginia. — The State *v.* Hurst, 11 W. Va. 54.

Wisconsin. — The State *v.* Kube, 20 Wis. 217.

United States. — District of Columbia. United States *v.* Hale, 4 Cranch C. C. 83; Jones *v.* United States, 5 Cranch C. C. 647.

[1] Oliver *v.* The State, 37 Ala. 134.

[2] As to this, see ante, § 420 and note. If its insertion is necessary, plainly it need not be both here and at the close of the indictment.

designedly did falsely pretend to the said X, that he the said A had run three clamps of timber from Davis bridge in said county to the mouth of Rock Fish creek; whereas, in truth and in fact, he the said A had not run three clamps of timber from Davis bridge in said county to the mouth of Rock Fish creek, as he the said A then and there well knew; by color and means of which said false pretences he the said A did then and there unlawfully, knowingly, and designedly obtain from the said X the sum of nine dollars [query, see post, § 423], property of said X, with intent[1] to cheat and defraud the said X; against the peace, &c.[2]

§ 423. **By Forged and other Worthless Paper.**[3] — For obtaining a chattel and coin by the false pretence that a flash note was good, it has been adjudged adequate in allegation, where the offence was misdemeanor, to say, —

That A, &c. and B, &c. on, &c. at, &c. unlawfully did falsely pretend to one X, that a certain printed paper then and there produced by him the said A, and by him offered and given to the said X in payment for certain pigs, before then agreed to be sold by the said X to the said A, was a good and valid promissory note for the payment of, &c.; by means of which said false pretence, the said A and B did then and there unlawfully obtain from the said X five pigs of the value of, &c., one piece of the current gold coin, &c. called, &c. of the value of, &c. [and specifying in like manner the rest of what was received in change[4]], of the moneys,

[1] See the last note.

[2] The State *v.* Dickson, 88 N. C. 643. In this form, which omits the word "feloniously," the offence is assumed to be misdemeanor. Of course, whether the pleader takes this form or the formula in section before the last, or any other, for his model, he will lay the statute on which he is proceeding before him, and see that his allegations do not depart from its terms. Another short form adjudged also to be good — The State *v.* Boon, 4 Jones, N. C. 463 — is, —

That A, &c. [being an evil-disposed person, *needless*, ante, § 46, and wickedly designing to cheat one X, *needless*, as see above], on, &c, [with force and arms, *needless*, ante, § 43], at, &c. knowingly and designedly, by means of a certain false token, to wit, by means of a quarter of a dollar which the said A well knew to be counterfeit, did then and there obtain from the said X one piece of gingerbread, with intent to cheat and defraud the said X; against the peace, &c.

Compare this form with the one several times longer, for the like offence, in Commonwealth *v.* Nason, 9 Gray, 125.

[3] Crim. Law, II. § 448.

[4] **How allege Money, &e.** — It appears to be the doctrine, that, in the absence of any statutory modification of common-law requirements, the allegation of the thing wrongfully taken must be the same in false pretences as in larceny. Crim. Proced. II. § 173. "Money" ordinarily means coin (Stat. Crimes, § 217, 344–346), the pieces taken must be described, and it will not suffice simply to say such a sum in money, or coin of so much value. Crim. Proced. II. § 703–705. *A fortiori*, the allegation of money will not cover bank-notes. Crim. Proced. II. § 732, where the right method is pointed out. The rules for this are embarrassing in practice, and they are in England and pretty extensively in this country relaxed by statute. In England the provision (14 & 15 Vict. c. 100, § 18) is, that, "in every indictment in which it shall be necessary to make any averment as to any money or any note of the bank, &c. it shall be sufficient to describe such money or bank-note simply as money, without specifying the particular coin," &c. And see ante, § 404.

goods, and chattels of the said X, with intent then and there to cheat and defraud him the said X of the same. Whereas in truth and in fact the said printed paper was not a good and valid promissory note for the payment of the aforesaid sum of, &c. or for the payment of any sum whatever [and this the said A and B then and there well knew [1]]; against the peace, &c.[2]

§ 424. **As to Pecuniary Standing.** — The allegations may be, —

That A, &c. on, &c. at, &c. did, with the intent to cheat and defraud one X, then and there [feloniously], unlawfully, knowingly, and designedly falsely pretend to the said X, that he the said A was owing but little; that he was owing M for a pair of oxen, and was not owing any other large debt; that the sale of wood and bark owned by him the said A would more than pay all he owed [*or*, setting out any other false pretences as they were actually made [3]]; and that his note for two hundred and fifty dollars [*or*, &c. as the proofs will be] was good; whereas, in truth and in fact, he was then owing large amounts; he was then owing other large debts in addition to what he was then owing M for a pair of oxen,[4] and the sale of wood and bark which he then owned would not more than pay for all he then owed, and his note for two hundred and fifty dollars was not then good [*or*, &c. negativing whatever pretences have been alleged], all of which he the said A then and there well knew; by color and means of which false pretences he the said A did then and there [feloniously], unlawfully, knowingly, and designedly obtain from the said X one pair of oxen of the property [*or*, goods and chattels, &c.[5]] of the said X, of the value of, &c. with the intent to cheat and defraud as aforesaid the said X; against the peace, &c.[6]

§ 425. **Other Pretences.** — The books are full of forms, setting out the allegations for almost every sort of false pretence imaginable. To copy them would simply augment these pages with no

[1] The matter in these brackets is, beyond a reasonable doubt, necessary in this case. Ante, § 419 and note. It is not in the indictment copied, but the particular question was not raised.

[2] Reg. *v.* Coulson, 1 Den. C. C. 592, 4 Cox C. C. 227. Compare this form with that for the like common-law cheat, ante, § 276. For other forms for cheating by the use of different sorts of forged and other worthless paper, see 3 Chit. Crim. Law, 1016; 6 Cox C. C. App. 49; 11 Ib. App. 11; Rex *v.* Freeth, Russ. & Ry. 127; Reg. *v.* Philpotts, 1 Car. & K. 112; Reg. *v.* Evans, 5 Car. & P. 553; Smith *v.* People, 47 N. Y. 303.

[3] Crim. Proced. II. § 178. "Where the false pretences consist of words used by the respondent, it is sufficient to set them out in the indictment as they were uttered, without undertaking to explain their meaning." Bellows, J. in The State *v.* Call, 48 N. H. 126, 131, 132.

[4] Crim. Proced. II. § 168; post, § 425, note.

[5] Ante, § 420.

[6] The State *v.* Call, supra. For other forms see post, § 434; 6 Cox C. C. App. 51, 53, 54, 94, 157. Against a married woman, who, living apart from her husband under an allowance, bought goods under the pretence that she was living with him and he would pay for them. Reg. *v.* Davis, 11 Cox C. C. 181.

compensating advantages to the pleader.[1] Still what is set down in the note may be helpful.

§ 426. **Personating.** — A species of false pretence is falsely personating another;[2] and, as such, it may be laid in the same manner as any other false pretence. Various sorts of it are likewise punishable under statutes made in special terms for their

[1] Ante, § 418. **Ownership.** — For obtaining valuables under the false pretence of owning particular property (Crim. Law, II. § 426, 444), The State *v.* McConkey, 49 Iowa, 499; Webster *v.* People, 92 N. Y. 422 (where land conveyed was subject to a mortgage); Commonwealth *v.* Lincoln, 11 Allen, 233 (personal property); 5 Cox C. C. App. 51, 90; 6 Ih. App. 60. In The State *v.* McConkey, supra, the allegation of the false pretence was, "that he the said A was then and there the owner of a certain city lot; to wit, lot one, in block two in Van's addition to the city of Des Moines, Iowa, and . . . that a certain lot which he the said A then and there pointed out, showed, and designated to him the said X, was lot one, in block two, in Van's addition to the city of Des Moines, Iowa, aforesaid." **Being Military Officer, &c.** — In one case the false pretence alleged was, "that he the said A was then and there a captain in the Sixth New York cavalry, and was then and there enlisting soldiers by authority of the United States government for his company, to wit, a company in," &c. People *v.* Cooke, 6 Parker C. C. 31. And see Reg. *v.* Gardner, Dears. & B. 40, 7 Cox C. C. 136. And for another like form, see Hamilton *v.* Reg. 9 Q. B. 271, 2 Cox C. C. 11; and the same form in Reg. *v.* Hamilton, 1 Cox C. C. 244, 245. **Bought Property** — which must be immediately paid for, 4 Cox C. C. App. 33. **Horse** — falsely represented sound, &c. Reg. *v.* Keighley, Dears. & B. 145, 7 Cox C. C. 217; 3 Cox C. C. App. 49; The State *v.* Jackson, 39 Conn. 229. **Authority.** — False pretence of authority to receive money, &c., ante, § 420; 6 Cox C. C. App. 51, 138. **Carrier, &c.** — falsely pretending delivery of parcel, or otherwise a sum due, 3 Chit. Crim. Law, 1019; The State *v.* Kube, 20 Wis. 217; Rex *v.* Airey, 2 East, 30; 6 Cox C. C. App. 55. **Work,** — false account of, 6 Cox C. C. App. 56. **Weight or Measure,** — false, 6 Cox C. C. App. 59, 62; Rex *v.* Reed, 7 Car. & P. 848; Reg. *v.* Lee, Leigh & C. 418, 9 Cox C. C. 460. **Society,** — false pretence as to enrolment of, &c. 5 Cox C. C. App. 79; 6 Ib. App. 58. **Unmarried,** — that the defendant was, Reg. *v.* Copeland, Car. & M. 516; Reg. *v.* Johnston, 2 Moody, 254. **Money Paid,** — false pretence as to, 3 Chit. Crim. Law, 1011; 6 Cox C. C. App. 51. **Pauper,** — falsely pretending a child to be a, 3 Chit. Crim. Law, 1009. **Goods,** — quality of, 6 Cox C. C. App. 60. In Reg. *v.* Kerrigan, Leigh & C. 383, 9 Cox C. C. 441, the allegations, a conviction whereon was affirmed, were, —

That A, &c. and B, &c. on, &c. at, &c. unlawfully, knowingly, and designedly did falsely pretend to X, that they the said A and B were possessed of a large quantity of good tobacco, to wit, two bales of tobacco containing, &c. of the value of, &c. and which they the said A and B then proposed to and did sell and deliver to the said X; by means of which said false pretence the said A and B did then and there unlawfully obtain from the said X the sum of, &c. of the moneys of him the said X [this allegation of money is probably not good except by the aid of statutes which now exist in England and largely in our States, as see ante, § 423 and note], with intent thereby then and there to cheat and defraud the said X [here slightly altering expressions authorized by English statute, to satisfy common-law rules]; whereas, in truth and in fact, the said A and B were not then possessed of and had not then in their possession a large quantity of good tobacco, to wit, two bales of tobacco containing, &c. of the value of, &c. as they the said A and B did then and there so falsely pretend, but only [here extending the negative averment beyond a bare denial, as see ante, § 424; Crim. Proced. II. § 168] two bales which contained half a pound weight of tobacco together with a large quantity of stones, bricks, and sawdust, as they the said A and B, at the time they so falsely pretended as aforesaid, well knew; against the peace, &c.

[2] Crim. Law, II. § 152–155, 439.

suppression. The indictment is easily drawn, and no special forms for it, under the greatly varying statutes, need here be given.[1]

§ 427. **Chose in Action.** — The indictment for obtaining *a chose in action* by false pretences is the same as that for thus getting any other property. But the pleader must see that he lays the acquired thing in proper terms.[2] And he should not confound this dereliction with that of —

§ 428. **Obtaining Signature.**[3] — A common form of the statutory expression is "obtain the signature of any person to any written instrument," the offence being otherwise the same as is supposed in the foregoing sections. The allegations may be, for example, —

[After setting out the false pretences in the usual way, proceed]: By means of which said false pretences the said A did then and there unlawfully, knowingly, and designedly [*or*, &c. employing the words of the statute] obtain the signature of the said X[4] to a certain bond bearing date, &c. in the penal sum of, &c. conditioned for the payment of, &c. to the said A, and also the signature of the said X and Y his wife to a certain indenture of mortgage bearing date, &c. executed to the said A upon certain real estate of the said X situated in the county of M. conditioned for the payment of the said sum of, &c. which indenture of mortgage was afterward duly recorded [and following, with the other allegations, the common forms].[5]

Or, the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully, feloniously, designedly, and with intent to defraud one X, represent and pretend to him the said X, that a certain instrument in writing which he the said A then and there had prepared ready to be executed by him the said X was an order for a certain number of patent churns; it being then and there understood by

[1] For forms, see 3 Chit. Crim. Law, 1083, 1085, 1086; 6 Cox C. C. App. 53; Rex *v.* Berthand, 4 Went. Pl. 55; Reg. *v.* Lake, 11 Cox C. C. 333; Rex *v.* Tannet, Russ. & Ry. 351; Rex *v.* Story, Russ. & Ry. 81; Rex *v.* Martin, Russ & Ry. 324; Rex *v.* Cramp, Russ. & Ry. 327; Rex *v.* Keefe, Jebb, 6; Rex *v.* Fitzmauriee, Jebb, 29; Martin *v.* The State, 1 Texas Ap. 586, 587.

[2] As to which see ante, § 423, note; Crim. Proced. II. § 732. For a form for thus obtaining a promissory note, see 4 Went. Pl. 78. Bill of exchange, 3 Chit. Crim. Law, 1020; 6 Cox C. C. App. 57. Bank check, 6 Cox C. C. App. 57. Valuable security, Rex *v.* Yates, 1 Moody, 170; Reg. *v.* Danger, Dears. & B. 307, 309, 7 Cox C. C. 303. Railway ticket, Reg. *v.* Boulton, 1 Den. C. C. 508, 2 Car. & K. 917, 3 Cox C. C. 576.

[3] Crim. Law, II. § 460, 484.

[4] This sufficiently implies, what is a neeessary part of the offence, that the instrument was delivered. Fenton *v.* People, 4 Hill, N. Y. 126.

[5] Fenton *v.* People, supra. For other forms on the same statute see People *v.* Stone, 9 Wend. 181; People *v.* Crissie, 4 Denio, 525; People *v.* Sully, 5 Parker C. C. 142.

and between the said A and the said X that he the said X should execute and deliver to him the said A such an order for patent churns. By means of which false representations and pretences the said A did then and there obtain the name and signature of him the said X to a certain written instrument in form of a promissory note of him the said X, purporting to bear date the day and year aforesaid, for the sum of, &c. payable sixty days after date to the said A or order, for value received. Whereas, in truth and in fact, the said instrument so prepared and made ready for the signature of him the said X was not an order for a certain number of patent churns, and was not any instrument which it was then and there understood between the said A and the said X that the said X should execute, all of which the said A then and there well knew; against the peace, &c.[1]

§ 429. **Money in Charity.** — For obtaining, by false pretences, a gift in charity,[2] the indictment sets out the particular pretences according to the fact, which varies in the several cases. And otherwise it is constructed on the ordinary models.[3]

§ 430. **Swindling.** — The various sorts of cheating, including this offence, are in some of the States termed swindling.[4] There appears to be nothing, depending on the name, to modify the indictment; but a reference to some cases in which are forms may be convenient.[5]

§ 431. **Confidence Game.** — We have a statute making it indictable to obtain "any money or property by means of the use of any false or bogus checks, or by any other means or device commonly called the confidence game."[6] The statute prescribes the form for the indictment.[7]

§ 432. **Sleight of Hand, &c.** — A statute makes punishable one who, "by the game of three-card monte, so called, or any other game, device, sleight of hand, pretensions to fortune-telling, trick, or other means whatever, by the use of cards or other im-

[1] The State *v.* Joaquin, 43 Iowa, 131. For other forms for obtaining a signature by false pretences, see Commonwealth *v.* Dean, 110 Mass. 64; Commonwealth *v.* Stevenson, 127 Mass. 446; Ellars *v.* The State, 25 Ohio State, 385; The State *v.* Pryor, 30 Ind. 350; Langford *v.* The State, 45 Ala. 26.

[2] Crim. Law, II. § 467.

[3] For a form, see Reg. *v.* John, 13 Cox C. C. 100, 107.

[4] And see Stat. Crimes, § 413.

[5] The State *v.* Wilson, 2 Mill, 135; Middleton *v.* The State, Dudley, S. C. 275; The State *v.* Dyer, 41 Texas, 520; Johnson *v.* The State, 41 Texas, 65; Burd *v.* The State, 39 Texas, 509; Marwilsky *v.* The State, 9 Texas Ap. 377; Stringer *v.* The State, 13 Texas Ap. 520 (overruling Tomkins *v.* The State, 33 Texas, 228); Mathews *v.* The State, 10 Texas Ap. 279; The State *v.* Gray, 29 Minn. 142; The State *v.* Quinn, 47 Iowa, 368.

[6] For it and its construction see Pierce *v.* People, 81 Ill. 98.

[7] For the form see Morton *v.* People, 47 Ill. 468.

plements or instruments, fraudulently obtains from another person property of any description."[1] And an indictment has been sustained alleging, —

That A, &c. on, &c. at, &c. did fraudulently obtain from one X, by means of a game, device, sleight of hand, and trick, by the use of cards and other implements and instruments, a more particular description of which said game, device, sleight of hand, trick, implements, instrument, and cards is to the jurors unknown, certain moneys, to wit, divers promissory notes current as money, of the amount and of the value in all of, &c. a more particular description of which is to the jurors unknown, of the property of him the said X; against the peace, &c.[2]

§ 433. **Defrauding Keeper of Hotel.** — Under the Minnesota statute it is good to say, —

That A, &c. on, &c. at, &c. did put up at a certain hotel of one X, and did then and there procure at the said hotel entertainment, accommodation, and board from the said X who was then and there the keeper thereof, without paying therefor, and with the intent to defraud him the said X; and on, &c. at, &c. did, with such fraudulent intent, remove from the said hotel the baggage and effects of him the said A, consisting of, &c. while there was remaining and existing thereon a lien for the proper charges due to the said X from the said A for the aforesaid entertainment, accommodation, and board; against the peace, &c.[3]

§ 434. **Attempts.** — Where steps toward cheating by false pretences have proved ineffectual, the disappointed wrong-doer may be indicted for the attempt.[4] How attempts in general are to be charged we have already seen.[5] In most cases, the ready method for this attempt is to construct the indictment the same as for a substantive cheat, but to say, "did attempt to obtain," &c. instead of "did obtain," &c.[6] Thus, —

That A, &c. on, &c. at, &c. did unlawfully, fraudulently, and deceitfully falsely pretend to one X that he was a member of a certain firm, &c., that the said firm, &c. was then in solvent circumstances, and had then a balance in its favor of ten thousand dollars; by means of which false pretences the said A did then and there unlawfully attempt and endeavor to unlawfully obtain from the said X [say what], of the value of, &c. of the

[1] Mass. Gen. Stats. c. 161, § 57.

[2] Commonwealth *v.* Ashton, 125 Mass. 384. Under a similar statute in Iowa it has been held adequate to say, "by means of a certain device and game did obtain from X the sum of five dollars, lawful money; said device being a sleight of hand game, performed with a strap, and known as the strap game." The State *v.* Quinn, 47 Iowa, 368.

[3] The State *v.* Benson, 28 Minn. 424.

[4] Crim. Law, II. § 488.

[5] Ante, § 100–112.

[6] Crim. Proced. II. § 194, 195.

property of the said X, with the intent then and there to cheat and defraud the said X of the same. Whereas, &c. [proceeding to the end as on a charge of the substantive offence]; against the peace, &c.[1]

[1] Reg. *v.* Kealey, 2 Den. C. C. 68, 70, 5 Cox C. C. 193. For other forms for the attempt, see 6 Cox C. C. App. 61; 7 Ib. App. 24; Reg. *v.* Garrett, Dears. 232; Reg. *v.* Eagleton, Dears. 376, 6 Cox C. C. 559; Reg. *v.* Henshaw, Leigh & C. 444, 9 Cox C. C. 472.

For FALSE TOKEN, see CHEATS AT COMMON LAW.
FELONIOUS HOMICIDE, see HOMICIDE.
FERRY, see WAY.
FIRING BUILDINGS, see ARSON.

CHAPTER XXXIV.

FISH AND GAME.[1]

§ 435. **In General — What for this Chapter.** — The offences under the statutes for the protection of fish and game are in the main simple, and little difficulty will arise in the construction of the indictment. Not, therefore, attempting to cover the whole ground, we shall in this chapter consider some of the forms, of a sort to enable the pleader to discern how the rest should be.

§ 436. **Game.**[2] — Under a statute making punishable any one who "shall have in his control or possession any wild fowl recently killed,"[3] the allegations may be, —

That A, &c. [ante, § 74–77] on, &c. at, &c. [ante, § 80] unlawfully did have in his control and possession a certain wild fowl, to wit, a plover,[4] then recently killed; against the peace, &c. [ante, § 66–69].[5]

§ 437. **Oysters and Clams.** — Under the provision that "no person shall take any oysters, quahaugs, clams, or other shellfish within the waters or on the shores of this State, unless he be an inhabitant thereof and domiciled therein; and every citizen of any other State or country who shall, &c. shall forfeit," &c. the indictment may aver, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], not being an inhabitant of this State and not being domiciled therein, but being a citizen of the State of M, did then and there, within the waters of this State, take from the said waters a large quantity, to wit, ten bushels of oysters; against the peace, &c. [ante, § 66–69].[6]

[1] For the direct elucidations of the offences created by statutes for the protection of fish and game, with the pleading, practice, and evidence, see Stat. Crimes, § 1128–1135. Indirect, Crim. Law, I. § 516; Crim. Proced. I. § 574; II. § 878; Stat. Crimes, § 20, 277, note.

[2] Stat. Crimes, § 1133–1135.

[3] 39 & 40 Vict. c. 29, § 2.

[4] See ante, § 346, note.

[5] Whitehead *v.* Smithers, 2 C. P. D 553.

[6] The State *v.* Medbury, 3 R. I. 138. For other forms see, for taking clams contrary to a statutory regulation, Commonwealth *v.* Bailey, 13 Allen, 541. Taking oysters from a fishery, 3 Chit. Crim. Law,

§ 438. **Fishing in Unlawful Manner.** — The allegations, if so the statutory terms are covered, may be, —

That A, &c. on, &c. at, &c. did unlawfully catch and take fish in and from the waters of M River in said county, with and by means of a certain net, and in another manner than by baited hook and line [*or*, otherwise negativing the method which the statute permits; *or*, under a statute in different terms, did unlawfully use a sweep seine in the waters of, &c. said seine having a mesh which stretches less than five inches]; against the peace, &c.[1]

§ 439. **Other Unlawful Fishing.** — The following, if on a statute which it covers, is good for fishing in a pond set apart for the private cultivation of fish: —

That A, &c. on, &c. at, &c. did unlawfully fish and take fish in and from that part of a certain pond commonly known as M Pond, in which fishes are lawfully cultivated and artificially maintained, without the permission of X, who was then and there the owner and proprietor of said fishes and pond; against the peace, &c.[2]

§ 440. **Obstructing Passage.** — Though permanently to obstruct the passage of fish up a navigable river, where the public have a right of fishing, is indictable at the common law, it is because such act is a common nuisance,[3] — not within this chapter. We have also, as to this, some restraining statutes.[4]

977. Violating the Maryland oyster act, Broll *v.* The State, 45 Md. 356. Virginia fishing law, Hendricks *v.* Commonwealth, 1 Mat. 934, 938. At common-law, for dredging and fishing for oysters in a public fishery "with certain unlawful trammels, drag-nets, sweep-nets, engines, and instruments" thereby destroying "several great quantities of very small oysters, &c. and spats of oysters," &c. to the preventing of their increase and the destruction of the fishery, Rex *v.* Lewis, Trem. P. C. 242.

[1] Maney *v.* The State, 6 Lea, 218; Commonwealth *v.* Wait, 131 Mass. 417. And see, for other forms, Moulton *v.* Wilby, 9 Cox C. C. 318; Hodgson *v.* Little, 9 Cox C. C. 327; People *v.* Reed, 47 Barb. 235; Updegraff *v.* Commonwealth, 6 S. & R. 5.

[2] Commonwealth *v.* Weatherhead, 110 Mass. 175; Commonwealth *v.* Vincent, 108 Mass. 441. For other forms, see 4 Went. Pl. 356; 3 Chit. Crim. Law, 976; Rex *v.* Sadler, 2 Chit. 519; Stuttsman *v.* The State, 57 Ind. 119; Rex *v.* Edwards, 1 East, 278. For breaking down dam and carrying away fish, 6 Cox C. C. App. 68, 69. Putting lime into fish pond, Ib. 69. Fishing at forbidden time, The State *v.* Cottle, 70 Maine, 198. On Sunday, Commonwealth *v.* McCurdy, 5 Mass. 324. By unauthorized persons, Commonwealth *v.* Wentworth, 15 Mass. 188.

[3] Stat. Crimes, § 1129.

[4] For forms for the indictment, see Commonwealth *v.* Knowlton, 2 Mass. 530; Commonwealth *v.* Ruggles, 10 Mass. 391.

For FOOD, see NOXIOUS AND ADULTERATED FOOD.

CHAPTER XXXV.

FORCIBLE ENTRY AND DETAINER.[1]

§ 441. **Cluster of Offences — (Elsewhere).** — The combined common and statutory laws of our differing States furnish a cluster of offences which, in this volume, are collected under the three several titles of "Forcible Entry and Detainer," "Forcible Trespass," and "Trespass to Lands." Yet these offences present such differences in the respective States as to admit of no quite satisfactory classification.

§ 442. **Formula for Indictment.** — The explanations in "Criminal Procedure"[2] will give the reader a better general idea of the indictment than it is possible for a formula to convey. Practically, it is in most instances on a statute, and the statutes are numerous and varying, and the terms of the particular one must be covered; while, likewise, the facts special to the individual case may largely influence even the allegations of the stabler sort. Still some help may be obtained from the following, which the pleader will accept as thus subject to be modified; namely, —

That A, &c. B, &c. and C, &c. [ante, § 74–77]. on, &c. at, &c. [ante, § 80], did forcibly, violently, tumultuously, and with a strong hand[3] enter into and upon a certain messuage and lands[4] then and there in the peaceable and quiet possession of one X; and him the said X did then and there forcibly, violently, tumultuously, and with a strong hand, putting him in fear, expel, amove, and put out therefrom [*or*, if the wrong consists of a forcible detainer, that A, &c. on, &c. at, &c. having theretofore obtained

[1] For the direct elucidations of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 489–516; Crim. Proced. II. § 369–388. Incidental, Crim. Law, I. § 536–538; Crim. Proced. I. § 170, 413. And compare with FORCIBLE TRESPASS — TRESPASS TO LANDS.

[2] Crim. Proced. II. § 371–383.

[3] The words specially adapted to this offence are "with a strong hand," and it is never practically well to omit them, though there may be an indictment so framed as to be good without them. Crim. Proced. II. § 371, 372, 377, 379.

[4] If there is to be a writ of restitution, the premises should be described as in ejectment; otherwise this minuteness is not necessary. Crim. Proced. II. § 373, 375, 381, 382.

and then and there being in the unlawful possession of a certain messuage and lands which, with the present right of possession thereof, then and there belonged to one X,[1] did then and there forcibly, violently, tumultuously, and with a strong hand, putting the said X in fear, detain and hold, and still does continue so as aforesaid to detain and hold, the same from the said X, keeping him so as aforesaid out of his lawful possession thereof]; against the peace, &c. [ante, § 66–69].[2]

§ 443. **At Common Law.** — The foregoing formula is believed to be adequate at the common law, as well as upon any statute the terms of which it duly covers. But as the indictability of this dereliction proceeds from its being a breach of the public peace,[3] it admits of being committed in a considerable variety of ways, and of corresponding differences in the indictment. For example, —

§ 444. **Common Form.** — The ordinary common-law form for a forcible entry, followed by a forcible detainer which it includes, is, as given in the English books, where it abounds in useless words, —

That A, &c. B, &c. and C, &c. [together with divers other persons to the number of six and more to the jurors aforesaid unknown [4]], on, &c. [with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons [5]], at, &c. into a certain barn and a certain orchard [there

[1] Crim. Law, II. § 502, 503, 512.

[2] For forms see Archb. Crim. Pl. & Ev. 19th ed. 907, 909; Dalt. Just. c. 182; 4 Went. Pl. 148–156; 6 Ib. 392, 403, 404, 428; 3 Chit. Crim. Law, 1136 *b*, 1137; 6 Cox C. C. App. 73, 74; Rex *v.* Hayton, Trem. P. C. 191; Rex *v.* Hampson, Trem. P. C. 191; Rex *v.* Edwards, Trem. P. C. 192; Rex *v.* Bathurst, Say. 225; Rex *v.* Lloyd, Cald. 415; Rex *v.* Hoare, 6 M. & S. 266; Rex *v.* Wilson, 8 T. R. 357; Reg. *v.* Martin, 10 L. C. Q. B. 435.

Arkansas. — The State *v.* Leathers, 31 Ark. 44.

Indiana. — The State *v.* Sparks, 60 Ind. 298; Endsley *v.* The State, 76 Ind. 467.

Maine. — Harding's Case, 1 Greenl. 22.

Massachusetts. — Commonwealth *v.* Shattuck, 4 Cush. 141.

Missouri. — The State *v.* Wilson, 3 Misso. 125.

New Hampshire. — The State *v.* Pearson, 2 N. H. 550; The State *v.* Harvey, 3 N. H. 65; The State *v.* Batchelder, 5 N. H. 549.

New York. — People *v.* Shaw, 1 Caines, 125; People *v.* Fulton, 1 Kernan, 94.

North Carolina. — The State *v.* Butler, Conference, 331; The State *v.* Love, 2 Dev. & Bat. 267; The State *v.* Bennett, 4 Dev. & Bat. 43; The State *v.* Fort, 4 Dev. & Bat. 192; The State *v.* Curtis, 4 Dev. & Bat. 222; The State *v.* Nations, 1 Ire. 325; The State *v.* Smith, 2 Ire. 127; The State *v.* Tolever, 5 Ire. 452; The State *v.* Morgan, 1 Winst. 246; The State *v.* Eason, 70 N. C. 88.

Pennsylvania. — McNair *v.* Rempublicam, 4 Yeates, 326; Commonwealth *v.* Taylor, 5 Binn. 277; Commonwealth *v.* Rogers, 1 S. & R. 124; Commonwealth *v.* Jackson, 1 Grant, Pa. 262.

Tennessee. — Temple *v.* The State, 6 Baxter, 496; Temple *v.* The State, 7 Baxter, 109.

[3] Crim. Law, I. § 536; II. § 504.

[4] Not necessary. Yet doubtless under some circumstances practically best. Ante, § 285, note, 288, 302, 305, 306.

[5] Unnecessary. Ante, § 43; Crim. Proced. I. § 502, 648, note; II. § 371.

situate[1]] and being, and then and there in the possession of one X, unlawfully, violently, forcibly, injuriously, and with a strong hand did enter; and [the said A, B, and C, together with the said other evil disposed persons to the jurors aforesaid unknown, as aforesaid[2]] then and there [with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons[3]], unlawfully, violently, forcibly, injuriously, and with a strong hand the said X from the possession of the said barn and orchard did expel, amove, and put out [thus far, a forcible entry is charged; the rest is for a forcible detainer of the same premises]; and the said X, so as aforesaid expelled, amoved, and put out from the possession of the said barn and orchard, then and there [with force and arms, to wit, with pistols, swords, sticks, staves, and other offensive weapons[4]] unlawfully, violently, forcibly, injuriously, and with a strong hand did keep out, and still do keep out [and other wrongs to the said X then and there did; to the great damage of the said X, and[5]] against the peace, &c.[6]

§ 445. **Dwelling-house.** — It is conceded that less is required to constitute an indictable forcible entry into an inhabited dwelling-house than into open lands.[7] And, with us, probably not contrary to the English doctrine, it is adequate in allegation to say, —

That A, &c. [*adding*, if the facts justify, B, &c. and C, &c.], on, &c. at, &c. did unlawfully, forcibly, violently, and with a strong hand enter into the dwelling-house of one X, who was then and there, with his family, in the actual, exclusive, and peaceable occupancy of the same, and did then and there unlawfully, violently, forcibly, and with a strong hand bore into the said dwelling-house with an auger, and cut away a part of said dwelling-house and stave in the doors and windows thereof with an axe, the wife and children of the said X being therein, and thereby put in fear; against the peace, &c.[8]

Or the allegations may be, —

That A, &c. B, &c. and C, &c. on, &c. at, &c. did unlawfully, violently, forcibly, and with a strong hand enter into a certain dwelling-house then

[1] As to "there situate," which are doubtless unnecessary words and practically objectionable, see ante, § 179, note, 253 and note. These words were not in the indictment in Rex *v.* Wilson, 8 T. R. 357, or Commonwealth *v.* Shattuck, 4 Cush. 141, if the forms are fully preserved in the reports, which is not absolutely certain, or in Harding's Case, 1 Greenl. 22, or, it is believed, in various other cases, where the omission passed without objection.

[2] The matter in these brackets seems only to weaken and obscure the allegation, and it is better omitted.

[3] Unnecessary, as see above.

[4] Not necessary, as see above.

[5] Unnecessary. Ante, § 48, 201 and note.

[6] Archb. Crim. Pl. & Ev. 10th ed. 600, 19th ed. 909; Matthews Crim. Law, 475. This form, more or less stripped of its verbiage, is the one used in Commonwealth *v.* Shattuck, supra, and various other American cases.

[7] Crim. Law, II. § 499, 505.

[8] Harding's Case, 1 Greenl. 22.

and there in the lawful, peaceable, and actual possession and inhabitancy of one X, and did then and there unlawfully, violently, forcibly, and with a strong hand throw certain filth and dead carcasses into the said house, she the said X then and there being therein and thereby put in fear, and then and there did remain cursing, abusing, and threatening the said X for a long time, to wit, for one half hour; against the peace, &c.[1]

§ 446. **Same in Night.** — This offence may be aggravated by being committed in the night, in which case it should be so charged. But at what point it passes the division-line between forcible entry and something else it would be difficult to say. Some forms for what might perhaps be deemed forcible entry into dwelling-houses in the night will be given further on under the title "Peace, Breach of."[2]

§ 447. **On Statute.** — The foregoing forms will need only to be modified to fit the statutory terms, to be available for indictments on the statutes. And —

§ 448. **In Conclusion,** — the full explanations given in the chapter in "Criminal Procedure," with partial forms, render unnecessary any further elucidations or forms in the present connection.

[1] The State *v.* Tolever, 5 Ire. 452.

[2] See, for example, the forms in Commonwealth *v.* Taylor, 5 Binn. 277; The State *v.* Wilson, 3 Misso. 125; The State *v.* Batchelder, 5 N. H. 549; post, § 856, 857.

CHAPTER XXXVI.

FORCIBLE TRESPASS.[1]

§ 449. **Connected Titles.** — This title is in subject closely connected with the titles "Forcible Entry and Detainer," "Malicious Mischief," "Peace, Breach of," and "Trespass to Lands," which it would be well to consult in connection with it.

§ 450. **Similar to Forcible Entry.** — This offence, differing from forcible entry chiefly in the property trespassed on being personal instead of real, and requiring the owner to be personally or by agent present,[2] may be charged in a similar way.[3] Thus, —

§ 451. **Form for Indictment.** — It is good to say, —

That on, &c. at, &c. one X, being lawfully possessed of twenty bushels of corn, A, &c. B, &c. and C, &c. did then and there unlawfully, forcibly, violently, and with a strong hand seize and take the said corn from and out of the actual possession and against the will of the said X, who was then and there, by Y his agent, present forbidding the same; against the peace, &c.[4]

§ 452. **Another.** — Or the allegations may be, —

That A, &c. and B, &c. on, &c. at, &c. unlawfully, forcibly, violently, and with a strong hand did take and carry away, out of the actual possession of X, a certain hog [of him the said X [5]], against his will, he being then and there personally present and forbidding the same; against the peace, &c.[6]

[1] See Crim. Law, II. § 517-520 *a*; Crim. Proced. II. § 389-395. Collateral, Crim. Law, I. § 536-539.

[2] Crim. Law, II. § 517, 520.

[3] Crim. Proced. II. § 390, 391.

[4] The State *v.* Drake, 1 Winst. 241. The form, in this case, goes on to charge also a forcible detainer. But a forcible detainer of personal property is not indictable. Crim. Law, II. § 520.

[5] Not in the form before me; nor, probably, is it necessary. Still, as to some circumstances, the suggestion may be worth considering.

[6] The State *v.* Barefoot, 89 N. C. 565. For other forms, see The State *v.* Mills, 2 Dev. 420; The State *v.* Love, 2 Dev. & Bat. 267; The State *v.* Bennett, 3 Dev. & Bat. 43; The State *v.* Armfield, 5 Ire. 207.

For FOREIGN ENLISTMENT ACT, see NEUTRALITY LAWS.
FORESTALLING, see Crim. Proced. II. § 396, where is given a form.

CHAPTER XXXVII.

FORGERY OF WRITINGS AND ITS KINDRED OFFENCES.[1]

§ 453. **Permissible Simplicity and Common Precedents.** — There is in the entire catalogue of crimes no one which can be more readily and simply charged, after the common-law rules, than forgery. Yet from early times the framers of indictments have been in the habit of introducing into their allegations for this offence needless matter, often in such form as to be descriptive and so to require proof of what otherwise might be rejected as surplusage, — the compilers of books of precedents have brought together and preserved the awkward forms as though they were bars of gold, — unskilled pleaders have been bewildered by the confused and incongruous glitter; and, at last, legislation has interfered, in England and in some of our States, to remove hardships which did not exist, and to make smooth what required no smoothing.

§ 454. **Elsewhere — Here.** — The rules for the indictment are stated with sufficient fulness in "Criminal Procedure."[2] But many things are permissible which are not expedient, and it is proposed here to point out to the pleader the simple and easy path.

§ 455. **Tenor.** — Whatever be the writing forged, and whether the indictment is for the forgery proper, for the uttering, or for any other like offence, the common-law rules require it to be set out by its tenor; purport and effect will not suffice.[3] In Eng-

[1] For the direct elucidations of the law of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 521–612; Crim. Proced. II. § 398–486. Collateral, Crim. Law, I. § 341, 479, 572, 584, 585, 650, 654, 676, 734, 748, 769, 815, 942, 974, 975; II. § 148, 149, 157, 158, 168; Crim. Proced. I. § 53, 61, 435, 449, 486, 488 *d*, 488 *e*, 490, 504, 523, 553, 554, 588, 590, 1007, 1098, 1126, 1127; II. § 250; Stat. Crimes, § 185, 205, note, 206, 217, 223, 306, 307, 309, 325–343. And compare with COUNTERFEITING, &c.

[2] Crim. Proced. II. § 398 et seq.

[3] Crim. Proced. I. § 559–563; II. § 401, 403–406, 437, 445–447, 462.

land, followed by some of our States, this nicety of averment has been declared by statutes unnecessary.[1] Still the practice of it involves no hardship, it only requires care, and it avoids some questions which might otherwise embarrass the subsequent proceedings on the simpler forms of the allegations. Therefore it is recommended that ordinarily, where this provision exists, the pleader do not avail himself of it in full. But instead of saying simply "of the tenor following," let him enlarge the expression to "of the tenor, purport, and effect following;" so that, if a variance not affecting the sense should appear at the trial, the statute will help him out. Then —

§ 456. **Purport Clause.** — The troublesome purport clause will pretty certainly cease to trouble, — not saying how it would be if the contents of the writing were less literally averred. It being set out in exact terms, the court would certainly know as of law whether it was a check, a bill of exchange, a promissory note, or whatever else it was, and beyond cavil there need be no allegation that it purported to be such; and thus a tangle, not unfrequently very embarrassing, would be avoided.[2] Let us, therefore, drop from our indictment this purport clause. Again, —

§ 457. **Name of Defrauded Person.** — The common-law rules require the name of the person, corporation, State, or the like, meant to be defrauded, to be averred if known to the grand jury; or, if not known, require the averment that it is not. Such person may be the one whose name is forged, or one to whom the forger meant to pass off the forgery. So it was common for the pleader to select one of these, and aver the intent to be to defraud him. But, if such person was the one whose name was forged, and he was shown at the trial to be a mere fictitious person, the indictment failed; or, if the other was selected, there might be an unforeseen failure. To remedy this difficulty, pleaders adopted the practice of inserting additional counts. And, finally, in England, followed by some of our States, it was declared by statute sufficient to charge an intent to defraud, in general terms, without giving names. All of which was needless. The indictment, under the common-law rules, might, in a single count, lay the intent to be to defraud X the apparent maker, Y the person to

[1] Crim. Proced. II. § 412.

[2] Ib. II. § 413–416, 439. And see post, § 459 and note, 463, note.

whom the forgery was or was meant to be passed, and "some person to the jurors unknown;" in which case, if the intent as to any one person was proved, the allegation would be sustained.[1] Let us adopt this simple method of the common law, but not to the extent of charging an intent to defraud an unknown person against palpable facts. Once more, —

§ 458. **Altered Writing.** — Where the forgery consists of fraudulently altering a genuine writing, the pleader is not, by the common-law rules, compelled to the inconvenient course — not only inconvenient in the allegations but doubly so in the proofs — of setting out the genuine instrument and then the alteration; but he is permitted, at his election, to charge a forgery of the instrument as it stands altered, without any reference to its previous stages, precisely the same as though it was never genuine.[2] No argument, to any thinking practitioner, is necessary to convince him that, in nearly all circumstances, this is the better practical method. Finally, —

§ 459. **Validity of Writing, &c. depending on Special Facts.** — In those rare, exceptional cases, in which the *apparent legal efficacy*[3] of the writing depends on special facts, which, therefore, must be averred, or wherein for any other reason special facts are essential to a *prima facie* case,[4] it will ordinarily be the more convenient method, and sufficient, to state them by way of introduction to the main charge; as —

That on, &c. at, &c. [such and such things transpired, *or* such and such a state of facts existed, an allegation which will vary with the particular case, and for which no general form is possible]; whereupon A, &c. then and there, &c. [setting out the forgery, or uttering, &c. as in ordinary cases. If subsequent explanations are required to prevent an obscurity, make them[5]].

[1] Ante, § 19–21; Crim. Proced. II. § 420–425 *b*.

[2] Crim. Proced. II. § 419, 426, 442, 446.

[3] Crim. Law, II. § 523.

[4] Crim. Proced. II. § 402, 415, 418 *a*, 459.

[5] As I understand the case of Rex *v.* Wilcox, Russ. & Ry. 50, sometimes mentioned as requiring the purport clause (ante, § 456; Crim. Proced. II. § 413, 414), the indictment was held ill because it did not contain an adequate setting out of this extrinsic matter. True, the brief note of the judges' opinion, by the reporter, is, that they deemed the indictment bad, "as it did not state what the instrument was in respect of which the forgery was alleged to have been committed, nor how the party signing it had authority to sign it." But, looking into the facts, we see that the indictment did not point out the legal efficacy of what had no efficacy on its face. So, comparing the words spoken with the facts spoken to, we discover that this is what the words mean, even assuming them to have been correctly transmitted by the reporter.

§ 460. **Formula for Indictment.** — Carrying in our minds these introductory explanations, and proceeding on their suggestions, we have the following general formula for the indictment, good at the common law or on any statute the terms whereof it duly covers: —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did [feloniously [1] and] falsely [2] forge and counterfeit [3] [*or*, if the offence is uttering,[4] utter [5] and publish [6] as true (*probably add*, to one X [7]); *or*, whether the indictment is for forgery or for uttering, if it is on a statute follow the statutory words] a certain writing on paper [8] [*or* a certain writing engrossed on parchment,[9] *or* a certain false writing sealed,[10] *or* a certain deed; [11] *or*, if the offence is uttering, a certain forged and counterfeit writing &c. as above, knowing the same to be forged and counterfeit [12]], the tenor, [purport, and effect [13]] whereof is [*or* are] as follows [here setting out the writing by an exact transcript,[14] *and*, if it is in a language other than English, add, and which being translated into the English language is as follows, proceeding with the translation [15]]; with the intent to defraud [*or*, &c. employing the statutory term] the said X, the said Y, and some person and persons to the jurors unknown; [16] against the peace, &c. [ante, § 66–69].[17]

[1] To be employed only where the offence is felony. Crim. Proced. I. § 533–537.

[2] "Falsely" is common, but not necessary unless in the statute. Crim. Proced. II. § 426.

[3] Probably both "forge" and "counterfeit" are not required at common law. Crim. Proced. ut sup. note. Yet it is safer to employ both.

[4] Crim. Law, II. § 605.

[5] Stat. Crimes, § 306.

[6] 3 Chit. Crim. Law, 1046. Probably either "utter" alone or "publish" alone will suffice, but it is common, and believed to be practically better, to unite the two, as in the text and in Archb. Crim. Pl. & Ev. 19th ed. 650.

[7] It is not certain that this is necessary where the name of the person to be defrauded is given. Crim. Proced. II. § 425, 447, 452; 3 Chit. Crim. Law, 1046.

[8] Crim. Proced. II. § 401.

[9] 3 Chit. Crim. Law, 1045.

[10] 3 Ib. 1063.

[11] Crim. Proced. II. § 418 *a*.

[12] Crim. Proced. II. § 401, 425, 447, 451.

[13] Unnecessary, except as explained ante, § 455.

[14] Crim. Proced. II. § 403–412.

[15] Crim. Proced. I. § 564; Rex *v.* Nundocomar, 20 Howell St. Tr. 923; Rex *v.* Goldstein, Russ. & Ry. 473, 3 Brod. & B. 201; Reg. *v.* Lee, 2 Moody & R. 281; Rex *v.* Szudurskie, 1 Moody, 429.

[16] Ante, § 457.

[17] For forms see 3 Chit. Crim. Law, 1044–1080; Archb. Crim. Pl. & Ev. 19th ed. 609, 621, 624–627, 631, 638, 641, 643–645, 647–651; 4 Went. Pl. 22–41; 6 Ib. 370, 371; 5 Cox C. C. App. 77; 7 Ib. App. 51; 10 Ib. App. 2–6; Rex *v.* Butter, 13 Howell St. Tr. 1249; Rex *v.* Hales, 17 Howell St. Tr. 161; Rex *v.* Murphy, 19 Howell St. Tr. 693; Rex *v.* Nundocomar, 20 Howell St. Tr. 923; Rex *v.* Rutter, Trem. P. C. 127; Rex *v.* Champion, Trem. P. C. 128; Rex *v.* Ferrers, Trem. P. C. 129; Rex *v.* Newman, Trem. P. C. 130; Rex *v.* Wordell, Trem. P. C. 132; Rex *v.* Ivy, Trem. P. C. 135; Rex *v.* Ward, 2 Ld. Raym. 1461; Rex *v.* Gibbs, 1 East, 173; Rex *v.* Elliot, 1 Leach, 4th ed. 175, 176; Rex *v.* Lovell, 1 Leach, 4th ed. 248; Rex *v.* Palmer, 1 Leach, 4th ed. 352; Rex *v.* Clinch, 1 Leach, 4th ed. 540; Rex *v.* Dunnett, 2 Leach, 4th ed. 581; Rex *v.* Reading, 2 Leach, 4th ed. 590; Rex *v.* Lyon, 2 Leach, 4th ed. 597; Rex

§ 461. **Statutory Forms.** — In a few States the statutes have provided forms which they declare sufficient. Some of them are

v. Hunter, 2 Leach, 4th ed. 624; Rex *v.* Gilchrist, 2 Leach, 4th ed. 657; Rex *v.* Gade, 2 Leach, 4th ed. 732; Rex *v.* Reeves, 2 Leach, 4th ed. 808; Rex *v.* Collins, 2 Leach, 4th ed. 827; Rex *v.* Thomas, 2 Leach, 4th ed. 877; Rex *v.* Thompson, 2 Leach, 4th ed. 910; Rex *v.* Palmer, 2 Leach, 4th ed. 978, Russ. & Ry. 72; Rex *v.* Crocker, 2 Leach, 4th ed. 987, Russ. & Ry. 97, 2 New Rep. 87; Rex *v.* Collicott, 2 Leach, 4th ed. 1048, Russ. & Ry. 212; Rex *v.* Morris, 2 Leach, 4th ed. 1096, Russ. & Ry. 270; Rex *v.* Wilcox, Russ. & Ry. 50; Rex *v.* Marshall, Russ. & Ry. 75; Rex *v.* Bontien, Russ. & Ry. 260; Rex *v.* Post, Russ. & Ry. 101; Rex *v.* Holden, Russ. & Ry. 154, 2 Taunt. 334; Rex *v.* Rushworth, Russ. & Ry. 317; Rex *v.* Frond, Russ. & Ry. 389, 1 Brod. & B. 300; Rex *v.* Pim, Russ. & Ry. 425; Rex *v.* Goldstein, Russ. & Ry. 473, 3 Brod. & B. 201; Rex *v.* Fauntleroy, 1 Moody, 52; Rex *v.* Chalmers, 1 Moody, 352; Rex *v.* Harris, 1 Moody, 393; Rex *v.* Horwell, 1 Moody, 405, 6 Car. & P. 148; Rex *v.* Bamfield, 1 Moody, 416; Rex *v.* Szudurskie, 1 Moody, 429; Rex *v.* Donnelly, 1 Moody, 438; Rex *v.* Warshaner, 1 Moody, 466; Rex *v.* Hart, 1 Moody, 486, 7 Car. & P. 652; Reg. *v.* Cropper, 2 Moody, 18; Reg. *v.* Hawkes, 2 Moody, 60; Reg. *v.* Pike, 2 Moody, 70; Reg. *v.* Hannon, 2 Moody, 77, 9 Car. & P. 11; Reg. *v.* Pringle, 2 Moody, 127, 9 Car. & P. 408; Reg. *v.* Davis, 2 Moody, 177, 9 Car. & P. 427; Reg. *v.* Robson, 2 Moody, 182, 9 Car. & P. 423; Reg. *v.* McConnell, 2 Moody, 298, 1 Car. & K. 371; Reg. *v.* Winterbottom, 1 Den. C. C. 41, 2 Car. & K. 37, 1 Cox C. C. 164; Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496, 2 Cox C. C. 437; Reg. *v.* Toshack, 1 Den. C. C. 492, 494, 4 Cox C. C. 38; Reg. *v.* Williams, 2 Den. C. C. 61, 64; Reg. *v.* Rinaldi, Leigh & C. 330, 9 Cox C. C. 391; Burke's Case, 1 Lewin, 318; Reg. *v.* Lee, 2 Moody & R. 281; Rex *v.* Brewer, 6 Car. & P. 363; Rex *v.* Moses, 7 Car. & P. 423; Rex *v.* Thomas, 7 Car. & P. 851; Reg. *v.* Sharpe, 8 Car. & P. 436; Reg. *v.* Cooper, 2 Car. & K. 586; Reg. *v.* Boult, 2 Car. & K. 604; Reg. *v.* Green, 3 Car. & K. 209; Reg. *v.* Mitchell, 2 Fost. & F. 44; Reg. *v.* Carter, 1 Cox C. C. 170; Reg. *v.* Lonsdale, 2 Cox C. C. 222; Reg. *v.* Smith, 2 Cox C. C. 358; Reg. *v.* Dixon, 3 Cox C. C. 289; Reg. *v.* Smythies, 4 Cox C. C. 94; Reg. *v.* Faderman, 4 Cox C. C. 359; Reg. *v.* Johnston, 5 Cox C. C. 133; Reg. *v.* Hartshorn, 6 Cox C. C. 395; Reg. *v.* Mahony, 6 Cox C. C. 487, 489; Reg. *v.* Roberts, 7 Cox C. C. 422; Reg. *v.* Powner, 12 Cox C. C. 235; Reg. *v.* Green, Jebb, 282; Reg. *v.* Preston, 21 U. C. Q. B. 86; Reg. *v.* Portis, 40 U. C. Q. B. 214.

Alabama. — Bostick *v.* The State, 34 Ala. 266; Harrison *v.* The State, 36 Ala. 248; McGuire *v.* The State, 37 Ala. 161; Thompson *v.* The State, 49 Ala. 16; Jones *v.* The State, 50 Ala. 161; Anderson *v.* The State, 65 Ala. 553.

Arkansas. — Van Horne *v.* The State, 5 Pike, 349; Gabe *v.* The State, 1 Eng. 519; McClellan *v.* The State, 32 Ark. 609.

California. — People *v.* Ah Woo, 28 Cal. 205; People *v.* Frank, 28 Cal. 507; People *v.* Tomlinson, 35 Cal. 503.

Georgia. — Wilcoxson *v.* The State, 60 Ga. 184; Berrisford *v.* The State, 66 Ga. 53.

Idaho. — People *v.* Heed, 1 Idaho Ter. N. S. 531.

Illinois. — Crofts *v.* People, 2 Scam. 442; Townsend *v.* People, 3 Scam. 326; Wallace *v.* People, 27 Ill. 45; Cross *v.* People, 47 Ill. 152, 154; Waterman *v.* People, 67 Ill. 91; Brown *v.* People, 86 Ill. 239; Langdale *v.* People, 100 Ill. 263, 266.

Indiana. — The State *v.* Moore, 6 Ind. 436; Wilkinson *v.* The State, 10 Ind. 372; Stewart *v.* The State, 24 Ind. 142; The State *v.* Cook, 52 Ind. 574; Harding *v.* The State, 54 Ind. 359; Bittings *v.* The State, 56 Ind. 101, 102; Shinn *v.* The State, 57 Ind. 144; Kahn *v.* The State, 58 Ind. 168; The State *v.* Dufour, 63 Ind. 567, 570; Yount *v.* The State, 64 Ind. 443; Rooker *v.* The State, 65 Ind. 86; Hess *v.* The State, 73 Ind. 537; The State *v.* Pease, 74 Ind. 263; Munson *v.* The State, 79 Ind. 541; Powers *v.* The State, 87 Ind. 97, 99.

Iowa. — Buckley *v.* The State, 2 Greene, Iowa, 162; The State *v.* Newland, 7 Iowa, 242; The State *v.* Barrett, 8 Iowa, 536; The State *v.* Thompson, 19 Iowa, 299;

simpler — or, at least, briefer — than those of the common

The State *v.* Johnson, 26 Iowa, 407; The State *v.* Nichols, 38 Iowa, 110; The State *v.* Baumon, 52 Iowa, 68; The State *v.* Davis, 53 Iowa, 252; The State *v.* Burgson, 53 Iowa, 318.

Kentucky. — Mount *v.* Commonwealth, 1 Duv. 90; Stowers *v.* Commonwealth, 12 Bush, 342, 343.

Louisiana. — The State *v.* Carr, 25 La. An. 407, 409; The State *v.* Flint, 33 La. An. 1288, 1290.

Maine. — The State *v.* Flye, 26 Maine, 312, 314; The State *v.* Bonney, 34 Maine, 223; The State *v.* Symonds, 36 Maine, 128.

Maryland. — Hawthorn *v.* The State, 56 Md. 530.

Massachusetts. — Commonwealth *v.* Stow, 1 Mass. 54; Commonwealth *v.* Boynton, 2 Mass. 77; Commonwealth *v.* Mycall, 2 Mass. 136; Commonwealth *v.* Morse, 2 Mass. 138; Commonwealth *v.* Ross, 2 Mass. 373; Brown *v.* Commonwealth, 8 Mass. 59; Commonwealth *v.* Houghton, 8 Mass. 107; Commonwealth *v.* Hayward, 10 Mass. 34; Commonwealth *v.* Atwood, 11 Mass. 93; Commonwealth *v.* Carey, 2 Pick. 47; Commonwealth *v.* Ray, 3 Gray, 441; Commonwealth *v.* Castles, 9 Gray, 123; Commonwealth *v.* Woods, 10 Gray, 477; Commonwealth *v.* Thomas, 10 Gray, 483; Commonwealth *v.* Baldwin, 11 Gray, 197; Commonwealth *v.* Simonds, 14 Gray, 59; Commonwealth *v.* Hall, 97 Mass. 570; Commonwealth *v.* Butterick, 100 Mass. 12; Commonwealth *v.* Hinds, 101 Mass. 209; Commonwealth *v.* Spilman, 124 Mass. 327; Pettes *v.* Commonwealth, 126 Mass. 242.

Michigan. — People *v.* Marion, 28 Mich. 255.

Minnesota. — The State *v.* Wheeler, 19 Minn. 98; The State *v.* Ribee, 27 Minn. 315, 316.

Mississippi. — Harrington *v.* The State, 54 Missis. 490.

Missouri. — Hobbs *v.* The State, 9 Misso. 855; The State *v.* Fenly, 18 Misso. 445, 448; The State *v.* Kroeger, 47 Misso. 552; The State *v.* Maupin, 57 Misso. 205; The State *v.* Fisher, 58 Misso. 256; The State *v.* Watson, 65 Misso. 115, 117; The State *v.* Fisher, 65 Misso. 437; The State *v.* Bibb, 68 Misso. 286.

Nebraska. — Haslip *v.* The State, 10 Neb. 590.

Nevada. — The State *v.* McKiernan, 17 Nev. 224, 227.

New Hampshire. — The State *v.* Carr, 5 N. H. 367; The State *v.* Ward, 6 N. H. 529; The State *v.* Hayden, 15 N. H. 355; The State *v.* Bryant, 17 N. H. 323; The State *v.* Young, 46 N. H. 266.

New Jersey. — The State *v.* Gustin, 2 Southard, 744, 749; The State *v.* Jones, 4 Halst. 357; West *v.* The State, 2 Zab. 212.

New York. — People *v.* Kingsley, 2 Cow. 522; People *v.* Wright, 9 Wend. 193; People *v.* Davis, 21 Wend. 309; People *v.* Peabody, 25 Wend. 472; People *v.* Lewis, 1 Wheeler Crim. Cas. 181; Roseckrans *v.* People, 5 Thomp. & C. 467, 468, 3 Hun, 287; Phelps *v.* People, 6 Hun, 428 (affirmed 72 N. Y. 365); Vincent *v.* People, 15 Abb. Pr. 234; Dennis *v.* People, 1 Parker C. C. 469; People *v.* Thoms, 3 Parker C. C. 256, 257; People *v.* Van Keuren, 5 Parker C. C. 66; Vincent *v.* People, 5 Parker C. C. 88; Cantor *v.* People, 5 Parker C. C. 217; People *v.* Noakes, 5 Parker C. C. 291; Tomlinson *v.* People, 5 Parker C. C. 313; Clements *v.* People, 5 Parker C. C. 337; People *v.* Graham, 1 Buf. 151; People *v.* Williams, 1 Buf. 568.

North Carolina. — The State *v.* Welsh, 3 Hawks, 404; The State *v.* Greenlee, 1 Dev. 523; The State *v.* Dourdon, 2 Dev. 443; The State *v.* Morgan, 2 Dev. & Bat. 348; The State *v.* McGardiner, 1 Ire. 27; The State *v.* Stanton, 1 Ire. 424; The State *v.* Bateman, 3 Ire. 474; The State *v.* Harris, 5 Ire. 287; The State *v.* Thornburg, 6 Ire. 79; The State *v.* Lamb, 65 N. C. 419; The State *v.* Davis, 69 N. C. 313; The State *v.* Lane, 80 N. C. 407.

Ohio. — McMillen *v.* The State, 5 Ohio, 268; Anderson *v.* The State, 7 Ohio, 2d pt. 250; Steedman *v.* The State, 11 Ohio, 82; Bevington *v.* The State, 2 Ohio State, 160; Poage *v.* The State, 3 Ohio State, 229; Chidester *v.* The State, 25 Ohio State, 433; Henry *v.* The State, 35 Ohio State, 128.

Pennsylvania. — Respublica *v.* Sweers, 1 Dall. 41, 42; Pennsylvania *v.* Huffman, Addison, 140; White *v.* Commonwealth,

law; but they are not in extensive use, and they require no explanations.[1]

§ 462. **Joining Forgery and Uttering.** — It is common to join, to the charge of forgery, that for uttering the forged instrument. A part of the precedents for the common-law offence put both accusations in one count, and a part have a count for each. Relying on the former class of precedents as evidence of the law, we have the result, which reason confirms, that a count charging both is not on its face double; and, where the facts to be shown in evidence may properly be deemed one transaction, this is evidently the better practical method.[2] The terms of most of our statutes are "forge *or* utter," &c.; and, on such a statute also, in a case of one transaction, the indictment may be either way.[3] But under the common-law rules, there can be no joinder, even by separate counts, where the one is felony and the other is misdemeanor.[4] Now, —

§ 463. **Ordinary Common-law Form — (Writ).** — The old common-law precedents for this offence abound in redundancies

4 Binn. 418; Ream *v.* Commonwealth, 3 S. & R. 207; Braddee *v.* Commonwealth, 6 Watts, 530; Drew *v.* Commonwealth, 1 Whart. 279; Commonwealth *v.* Beamish, 31 Smith, Pa. 389; McClure *v.* Commonwealth, 5 Norris, Pa. 353; Commonwealth *v.* Luberg, 13 Norris, Pa. 85.

Rhode Island. — The State *v.* Brown, 1 R. I. 528.

South Carolina. — The State *v.* Washington, 1 Bay, 120.

Tennessee. — Rice *v.* The State, 1 Yerg. 432; Matthews *v.* The State, 2 Yerg 233; Walton *v.* The State, 6 Yerg. 377; Hooper *v.* The State, 8 Humph. 93; The State *v.* Martin, 9 Humph. 55; Williams *v.* The State, 9 Humph. 80; The State *v.* Corley, 4 Baxter, 410; The State *v.* Ward, 7 Baxter, 76.

Texas. — Shanks *v.* The State, 25 Texas Supp. 326; Horton *v.* The State, 32 Texas, 79; Ham *v.* The State, 4 Texas Ap. 645, 647; Labbaite *v.* The State, 6 Texas Ap. 257; Potter *v.* The State, 9 Texas Ap. 55; Johnson *v.* The State, 9 Texas Ap. 249, 250; Rogers *v.* The State, 11 Texas Ap. 608, 610.

Vermont. — The State *v.* McLeran, 1 Aikens, 311; The State *v.* Randall, 2 Aikens, 89; The State *v.* Wilkins, 17 Vt. 151; The State *v.* Morton, 27 Vt. 310; The State *v.* Shelters, 51 Vt. 102.

Virginia. — Commonwealth *v.* Kearns, 1 Va. Cas. 109; Commonwealth *v.* Quann, 2 Va. Cas. 89; Murry *v.* Commonwealth, 5 Leigh, 720; Buckland *v.* Commonwealth, 8 Leigh, 732; Jett *v.* Commonwealth, 18 Grat. 933; Coleman *v.* Commonwealth, 25 Grat. 865.

Wisconsin. — The State *v.* Morton, 8 Wis. 352.

United States. — United States *v.* Brewster, 7 Pet. 164; United States *v.* Wilcox, 4 Blatch. 385; United States *v.* Fisler, 4 Bis. 59; United States *v.* Williams, 4 Bis. 302; United States *v.* Cantril, 4 Cranch, 167; United States *v.* Hall, 4 Cranch C. C. 229; United States *v.* Noble, 5 Cranch C. C. 371.

[1] Bostick *v.* The State, 34 Ala. 266; McGuire *v.* The State, 37 Ala. 161; Thompson *v.* The State, 49 Ala. 16; Van Horne *v.* The State, 5 Pike, 349. Compare with Stowers *v.* Commonwealth, 12 Bush, 342, 343.

[2] See the places referred to ante, § 460, and compare with Crim. Proced. II. § 436, 476–481.

[3] Crim. Proced. I. § 436, 438; II. § 437.

[4] Ib. I. § 445–447.

which modern usage has discarded. There is no need to waken them from their sleep with the dead. The following form is from the English books, and is comparatively modern: —

That A, &c. on, &c. at, &c. [unlawfully and wickedly contriving to injure, oppress, impoverish, and defraud one X[1]] then and there[2] unlawfully, knowingly, and falsely did forge and counterfeit a certain writing [on parchment[3] purporting to be a writ of our Lady the Queen of *fieri facias*, and to have issued out of the court of our said Lady the Queen of the bench at Westminster, in the county aforesaid[4]]; which said false, forged, and counterfeit writing is as follows; that is to say [here setting it out as directed ante, § 460]; with intent the said X to injure, oppress, impoverish, and defraud; [the charge of forgery is now complete, and the indictment may close here if the pleader chooses; *or*, he may add an allegation of uttering, thus] and the said A afterwards, and before the said pretended writ purported to be returnable, to wit, on the day and year aforesaid, at, &c. aforesaid, the said false, forged, and counterfeited writing knowingly, falsely, and deceitfully, as a true writ of our said Lady the Queen of *fieri facias*, did cause to be delivered to the then sheriff of Middlesex, for execution to be made thereof; and afterwards, and before the said pretended writ purported to be returnable, to wit, on the day and year aforesaid, at, &c. aforesaid, did cause to be seized and taken divers goods and chattels of the said X to a large amount, by pretence of the said pretended writ; [to the great damage of the said X, to the evil example of all others in the like case offending,[5] and] against the peace, &c.[6]

§ 464. **Promissory Note.** — The allegations for forging and uttering a promissory note may be, —

That A, &c. on, &c. at, &c. did falsely [and feloniously] make, forge, and counterfeit [*or*, &c. following the statutory expression] a writing on paper [purporting to be a promissory note[7]] of the tenor follow-

[1] The allegation of the intent to defraud X is necessary; but, where it is made further on, it need not be premised here also.

[2] This "then and there" is pretty plainly not necessary.

[3] As our writs are not on parchment, these words "on parchment" should be omitted with us.

[4] That this purport clause is not necessary, see ante, § 456. Still, in a case, such as the present, free from the danger of embarrassing questions of variance at the trial, I should retain enough of the purport clause to indicate in a general way the nature of the instrument; because thereby the whole indictment would be made more perspicuous. Thus, in this instance, I should simply say, "purporting to be a writ of *fieri facias*." But the copy of the writ would show all the rest of the matter alleged in this purport clause; and surely there is no need of putting one thing twice into an indictment.

[5] Not necessary. Ante, § 48.

[6] Archb. Crim. Pl. & Ev. 10th ed. 391. For nearly the same form, in terms differently varied, see 3 Chit. Crim. Law, 1044; Rex *v.* Rutter, Trem. P. C. 127; Rex *v.* Champion, Trem. P. C. 128. For altering writ, 3 Chit. Crim. Law, 1047; Commonwealth *v.* Mycall, 2 Mass. 136.

[7] As the purport clause is not necessary, this matter in brackets, which is a part of such clause, is not. Yet the pleader may

ing[1] [here setting it out], with intent to defraud, &c. [as in the form, ante, § 460]; and did afterward, then and there, with the intent to defraud one X, [feloniously, &c. and follow the statutory expression] utter and publish the same to the said X as true, well knowing the same to be false, forged, and counterfeit; against the peace, &c.[2]

§ 465. **Bank-bill — (Forging).** — A bank-bill is a promissory note, and ordinarily it may be charged as such in the forgery indictment. But we have some statutes against forgery so specially worded that an indictment upon them will be ill if it designates a bank-bill as a "promissory note."[3] For the forging, the allegations, subject to be varied to cover particular statutory words,[4] may, if the form in the last section is not followed, be, —

That A, &c. on, &c. at, &c. did falsely [and feloniously] make, forge, and counterfeit a bank-note [*or* bank-bill, *or* writing on paper purporting to be a bank-note] of the tenor following [here setting it out], with intent to defraud the said bank[5] and some persons to the jurors unknown;[6] against the peace, &c.[7]

§ 466. **Uttering Bank-bill.** — Under the qualifications just expressed, the indictment for the uttering may allege, —

choose to preserve so much of it, as see ante, § 463, note.

[1] Or the expression may be —

Did forge, &c. [as in the text, not a writing on paper, &c. but] a certain promissory note of the tenor following.

[2] If the indictment is on a statute, as almost of course it will be, follow its terms, which may require expansions beyond the words in the text. And see, for other forms, 3 Chit. Crim. Law, 1074; Rex *v.* Crocker, Russ. & Ry. 97, 2 Leach, 4th ed. 987, 2 New Rep. 87; Reg. *v.* Mahony, 6 Cox C. C. 487, 489; Commonwealth *v.* Castles, 9 Gray, 123; Stowers *v.* Commonwealth, 12 Bush, 342, 343; Poage *v.* The State, 3 Ohio State, 229; The State *v.* Bryant, 17 N. H. 323; The State *v.* Harris, 5 Ire. 287; Labbaite *v.* The State, 6 Texas Ap. 257; Commonwealth *v.* Ross, 2 Mass. 373; Yount *v.* The State, 64 Ind. 443; Kahn *v.* The State, 58 Ind. 168; Stewart *v.* The State, 24 Ind. 142; Burke's Case, 1 Lewin, 318; Horton *v.* The State, 32 Texas, 79; The State *v.* Davis, 53 Iowa, 252; Commonwealth *v.* Atwood, 11 Mass. 93; Haslip *v.* The State, 10 Neb. 590; White *v.* Commonwealth, 4 Binn. 418, The State *v.* Welsh, 3 Hawks, 404.

[3] Stat. Crimes, § 326.

[4] The importance of this suggestion is very great. No pleader should, in prudence, ever draw an indictment for an offence of this class, except with the statute before him, and after he has learned its interpretation. Ante, § 31–33. See, for an illustration, Commonwealth *v.* Simonds, 11 Gray, 306.

[5] Let us bear in mind that the name of the bank will appear in the copy of the bank-bill. And that this is a sufficient designation and description of it, see Crim. Proced. II. § 454, 455. There are statutes the special terms whereof require the corporate existence to be averred and proved. Ib. § 454–457.

[6] Ante, § 455–457.

[7] For other forms, see Archb. Crim. Pl. & Ev. 10th ed. 369; 3 Chit. Crim. Law, 1048, 1051; Rex *v.* Goldstein, Russ. & Ry. 473, 3 Brod. & B. 201 (foreign treasury note in the foreign language); Rex *v.* Post, Russ. & Ry. 101; Rex *v.* Elliot, 1 Leach, 4th ed. 175, 176; Commonwealth *v.* Hayward, 10 Mass. 34.

That A, &c. on, &c. at, &c. did fraudulently [and feloniously] utter and publish [*or*, &c. using the statutory words] as true, to one X,[1] a false, forged, and counterfeit bank-bill [here, also, follow the statutory terms; *or* ten, &c.] of the tenor [*or* severally and respectively of the tenor] following [here set it or them out by exact copy], he the said A then and there well knowing the same to be false, forged, and counterfeit, with intent to injure and defraud the said bank [*or* each of the said several banks], and the said X, and some person and persons to the jurors unknown; against the peace, &c.[2]

§ 467. **Possessing with Intent.** — The charge of possessing counterfeit bank-bills with intent to utter them is sometimes made a part of the same count with that for the uttering. On the other hand also, it often constitutes a separate count or indictment. In either case, the terms of it, to be varied with the statute, may be, —

That A, &c. on, &c. at, &c. did fraudulently [and feloniously] have in his possession [*or*, &c. following the statutory expression] a false, forged, and counterfeit bank-bill [*or* two, &c. *or* ten, &c.] of the tenor [*or* severally and respectively of the tenor] following [here setting it or them out by exact copy], he the said A then and there well knowing the same to be false, forged, and counterfeit, with intent to utter and publish the same as true [to sundry persons to the jurors unknown, and to such other persons as he might defraud thereby [3]], and to defraud the said bank [*or* said several banks respectively] and sundry persons to the jurors unknown [here add, if desirable, an actual uttering]; against the peace, &c.[4]

[1] Ante, § 460 and note.

[2] For other forms, see 3 Chit. Crim. Law, 1048–1054; Archb. Crim. Pl. & Ev. 19th ed. 624; Rex *v.* Graham, 4 Went. Pl. 25, 27; United States *v.* Brewster, 7 Pet. 164; Rex *v.* Palmer, 2 Leach, 4th ed. 978, Russ. & Ry. 72; Wilkinson *v.* The State, 10 Ind. 372; Commonwealth *v.* Boynton, 2 Mass. 77; Commonwealth *v.* Simonds, 14 Gray, 59; Hobbs *v.* The State, 9 Misso. 855; Buckland *v.* Commonwealth, 8 Leigh, 732; Commonwealth *v.* Thomas, 10 Gray, 483; Commonwealth *v.* Carey, 2 Pick. 47; United States *v.* Cantril, 4 Cranch, 167; United States *v.* Hall, 4 Cranch C. C. 229; Hooper *v.* The State, 8 Humph. 93; Williams *v.* The State, 9 Humph. 80; The State *v.* Wilkins, 17 Vt. 151; Murry *v.* Commonwealth, 5 Leigh, 720; Jett *v.* Commonwealth, 18 Grat. 933; Rex *v.* Holden, Russ. & Ry. 154, 2 Taunt. 334; Reg. *v.* Green, 3 Car. & K. 209; Buckley *v.* The State, 2 Greene, Iowa, 162; The State *v.* Newland, 7 Iowa, 242; The State *v.* Barrett, 8 Iowa, 536; The State *v.* Hayden, 15 N. H. 355; Reg. *v.* Lee, 2 Moody & R. 281; Mount *v.* Commonwealth, 1 Duv. 90; The State *v.* Ward, 6 N. H. 529; The State *v.* Carr, 5 N. H. 367; People *v.* Lewis, 1 Wheeler Crim. Cas. 181.

[3] Probably not necessary; as see ante, § 460 and note.

[4] For other forms, see 3 Chit. Crim. Law, 1050; Townsend *v* People, 3 Scam. 326; United States *v.* Williams, 4 Bis. 302; People *v.* Peabody, 25 Wend. 472; Brown *v.* Commonwealth, 8 Mass. 59; Commonwealth *v.* Atwood, 11 Mass. 93; People *v.* Thoms, 3 Parker C. C. 256, 257; The State *v.* Dourdon, 2 Dev. 443; Commonwealth *v.* Woods, 10 Gray, 477; Commonwealth *v.* Houghton, 8 Mass. 107; Commonwealth *v.* Morse, 2 Mass. 138; The State *v.* Symonds, 36 Maine, 128;

§ 468. **Bill of Exchange — (Forging and Uttering).** — The foregoing models will serve for a bill of exchange. Or the form may be varied; as, for example, on a statute making it felony to "forge any bill of exchange, or utter as true any forged bill of exchange knowing it to be forged," it will be good to say, —

That A, &c. on, &c. at, &c. did feloniously forge a bill of exchange [*or* a writing on paper, *or* a writing on paper purporting to be a bill of exchange], and did then and there, knowing such bill of exchange [*or* writing] to be forged, utter the same as true[1] [to one X[2]], of the tenor following [here setting it out[3]], with the intent to defraud the said X, the said Y [the apparent drawer of the bill], the said Z [the drawee or acceptor], and other persons whose names are to the jurors unknown;[4] against the peace, &c.[5]

§ 469. **Bank-check.** — A bank-check is so far in the nature of a bill of exchange that the indictment for forging or uttering it may assume the same form; of course, designating it, not as a "bill of exchange," but as a "bank-check." No separate form, therefore, need be here given. The pleader should bear in mind the necessity of adhering to the statutory terms.[6]

The State *v.* Bonney, 34 Maine, 223; Gabe *v.* The State, 1 Eng. 519; The State *v.* Morton, 8 Wis. 352; United States *v.* Noble, 5 Cranch C. C. 371; The State *v.* Randall, 2 Aikens, 89; McMillen *v.* The State, 5 Ohio, 268; Bevington *v.* The State, 2 Ohio State, 160; Tomlinson *v.* People, 5 Parker C. C. 313; People *v.* Van Keuren, 5 Parker C. C. 66; Dennis *v.* People, 1 Parker C. C. 469; People *v.* Lewis, 1 Wheeler Crim. Cas. 181; People *v.* Davis, 21 Wend. 309; Commonwealth *v.* Hall, 97 Mass. 570; Matthews *v.* The State, 2 Yerg. 233; United States *v.* Fisler, 4 Bis. 59.

[1] These words "as true" are necessary even under some statutes which do not contain them, being introduced by interpretation. Crim. Proced. II. § 464.

[2] As to the necessity for this, see ante, § 460 and note.

[3] If the forgery or uttering has no relation to the acceptance, there is no need of setting out the latter; as, see the forms in 3 Chit. Crim. Law, 1071; Rex *v.* Gilchrist, 2 Leach, 4th ed. 657; Rex *v.* Hart, 1 Moody, 486, 7 Car. & P. 652; and in perhaps most of the precedents it is not set out. Under some of the statutes, and generally, it is no part of the bill. Stat. Crimes, § 338 and note; Rex *v.* Horwell, 1 Moody, 405, 6 Car. & P. 148. Yet in some cases the pleader will choose to set it out. To let it simply follow in the copy the bill, as though a part of it, would seem to be ordinarily adequate; or, if it is across the face of the original, it may be written across the face of the copy. See Rex *v.* Horwell, supra; Rex *v.* Szudurskie, 1 Moody, 429. Or, after the copy of the bill proper, the allegation may proceed: —

And on the back [*or* across the face] of said forged bill of exchange [*or* forged writing] [*or*, across which bill of exchange] were and are the words "Accepted, George Johnson."

[4] Ante, § 457.

[5] For other forms, see the places referred to in the note before the last; Archb. Crim. Pl. & Ev. 10th ed. 372, 373; 4 Went. Pl. 28-31; Rex *v.* Reading, 2 Leach, 4th ed. 590; Rex *v.* Brewer, 6 Car. & P. 363.

[6] For forms, see The State *v.* Kroeger, 47 Misso. 552; Cross *v.* People, 47 Ill. 152; Clements *v.* People, 5 Parker C. C. 337; The State *v.* Morton, 27 Vt. 310; Crofts *v.* People, 2 Scam. 442.

§ 470. **Order, Warrant, Request, Draft, &c.**[1] — These instruments, authorizing or requiring the payment of money, the delivery of goods, or the like, so far resemble bills of exchange that ordinarily, as in the case of bank-checks, the indictment for the forgery or the uttering is in substantially the same form. But there is sometimes doubt as to the right name of an instrument of this class, rendering the indictment and proofs specially troublesome by reason of a threatened variance, where the purport clause is employed; for which and other reasons the pleader is recommended commonly to omit this clause entirely, not even designating the instrument by its name.[2] Still, though the name is omitted, the instrument must appear on its face as set out, or be made in averment to appear, to the judicial understanding, to be within the statutory terms and of *prima facie* validity. When extrinsic matter is for this reason required to be alleged, weave it into the other averments in the manner already directed.[3] When not, the form may be, for the forgery, if so the terms of the statute are covered, —

That A, &c. on, &c. at, &c. did falsely [and feloniously] make and forge [*or*, &c. employing the statutory expression] a writing on paper of the tenor following [here setting it out], with the intent to injure and defraud the said X, the said Y, and some person to the jurors unknown; against the peace, &c.

If the pleader chooses to charge an uttering in a second count,[4] which is the method in the greater number of the precedents, let him proceed, —

And the jurors aforesaid on their oath aforesaid do further present,[5] that the said A did afterward, on the day and year aforesaid, at, &c. aforesaid, fraudulently [and feloniously] utter, publish, and put off as true [*or*, &c. employing the statutory words], [to one X[6]], a certain other false, forged, and counterfeit [*or*, &c. following the language of the statute] writing on paper, of the tenor following [here setting it out], he the said A then and there well knowing the same to be false, forged, and counterfeit, with intent to injure and defraud the said X, the said Y, the said Z, and other persons to the jurors unknown; against the peace, &c.[7]

[1] Stat. Crimes, § 325–336; Crim. Law, II. § 545–547, 560; Crim. Proced. II. § 439, 473, 474.

[2] Ante, § 456.

[3] Ante, § 459.

[4] Ante, § 462.

[5] Ante, § 64.

[6] As to which see ante, § 460 and note.

[7] For other forms, for the forgery and for the uttering, see Crim. Proced. II. § 473; Archb. Crim. Pl. & Ev. 10th ed. 374; 3 Chit. Crim. Law, 1054, 1074; Rex

§ 471. **Receipt, Acquittance, &c.** — For forging and uttering receipts, acquittances, and other like writings, the indictment is readily drawn on such of the foregoing models as the pleader may select. Some places where precedents can be found are referred to in the note.[1]

§ 472. **Indorsement — (Acceptance — Other Indorsed Matter).** — Where the offence consists of forging something upon the back or other part of a genuine instrument, the indictment first recites such instrument, then charges the forgery of the added matter, and copies it. For example, —

That A, &c. on, &c. at, &c. did, upon the back of a bill of exchange of the tenor following [here setting it out], falsely [and feloniously] make, forge, and counterfeit [*or*, &c. employing the statutory expression] an indorsement thereof in the following words, "Mary M. McCarthy" [the name of the payee]; with the intent to injure and defraud the said, &c. [as at ante, § 457, 470, &c.]; against the peace, &c.

Or, for uttering, —

That A, &c. on, &c. at, &c. having in his hands and possession a bill of exchange [*or* writing on paper] of the tenor following [here setting it out], on the back of which bill of exchange [*or* writing] was and is a false, forged, and counterfeit acceptance [*or* indorsement] in the following words [setting it out], did then and there, well knowing the said acceptance [*or*

v. Lovell, 1 Leach, 4th ed. 248; Rex *v.* Clinch, 1 Leach, 4th ed. 540; Rex *v.* Thomas, 2 Leach, 4th ed. 877; Rex *v.* Rushworth, Russ. & Ry. 317; Rex *v.* Froud, Russ. & Ry. 389, 1 Brod. & B. 300; Rex *v.* Bamfield, 1 Moody, 416; Rex *v.* Donnelly, 1 Moody, 438; Reg. *v.* Pike, 2 Moody, 70; Reg. *v.* Robson, 2 Moody, 182, 9 Car. & P. 423; Reg. *v.* McConnell, 2 Moody, 298, 1 Car. & K. 371; Reg. *v.* Williams, 2 Den. C. C. 61, 64; Reg. *v.* Carter, 1 Cox C. C. 170; Reg. *v.* Lonsdale, 2 Cox C. C. 222; Reg. *v.* Dixon, 3 Cox C. C. 289; Rex *v.* Thomas, 7 Car. & P. 851; Langdale *v.* People, 100 Ill. 263, 266; Commonwealth *v.* Quann, 2 Va. Cas. 89; The State *v.* Flye, 26 Maine, 312, 314; The State *v.* Watson, 65 Misso. 115, 117; People *v.* Noakes, 5 Parker C. C. 291; The State *v.* Lamb, 65 N. C. 419; Commonwealth *v.* Kearns, 1 Va. Cas. 109; The State *v.* Bauman, 52 Iowa, 68.

[1] 3 Chit. Crim. Law, 1076, 1079; Archb. Crim. Pl. & Ev. 19th ed. 638; Rex *v.* Ferrers, Trem. P. C. 129; Rex *v.* Lyon, 2 Leach, 4th ed. 597; Rex *v.* Hunter, 2 Leach, 4th ed. 624; Rex *v.* Thompson, 2 Leach, 4th ed. 910; Reg. *v.* Pringle, 2 Moody, 127, 9 Car. & P. 408; Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496, 2 Cox C. C. 437; Reg. *v.* Green, Jebb, 282; The State *v.* Thornburg, 6 Ire. 79; The State *v.* Bibb, 68 Misso. 286; Henry *v.* The State, 35 Ohio State, 128; Pennsylvania *v.* Huffman, Addison, 140; Rice *v.* The State, 1 Yerg. 432. In this case of Rice *v.* The State, it was held that the indictment for forging a receipt must aver an indebtedness. But such, it is believed, is not the general doctrine, either on principle or on authority, in the absence of special statutory terms. And though there are precedents with this averment, most do not have it. Still the language of a receipt may be so imperfect as to require this averment in explanation. And in various other cases explanatory allegations are necessary, in order to show *prima facie* guilt, in this class of indictments.

indorsement] to be false, forged, and counterfeit, utter and publish the same [to X [1]], as true, with intent to injure and defraud the said, &c. [as in the last form]; against the peace, &c.[2]

§ 473. **Erasing or Detaching Indorsement.** — To erase or detach an indorsement which constitutes no part of the original instrument is not ordinarily deemed a forgery at the common law, though it is an indictable misdemeanor.[3] For such common-law misdemeanor, the following form, here somewhat amended in immaterial parts, has been judicially sustained: —

That A, &c. on, &c. at, &c. having in his possession a certain promissory note of the tenor following [here setting it out], on the back whereof was then and there indorsed the receipt of twenty dollars in part payment thereof, and the balance of said note and no more being then and there due and unpaid, did then and there wittingly, falsely, and deceitfully alter the said promissory note, by then and there wittingly and deceitfully separating said indorsement from said promissory note, with intent to defraud and deceive the said X [the maker]; against the peace, &c.[4]

§ 474. **Altering.** — Though commonly it is practically best to charge an alteration as an original forgery,[5] it is not always so. When, therefore, the pleader chooses, he first sets out the original writing, then states the alteration;[6] and sometimes, but not necessarily, adds a recital of the whole in its altered form. It is good to say, —

That A, &c. on, &c. at, &c. having in possession a certain writing on paper [*or* a certain writing sealed, *or* a certain deed [7]] of the tenor following [here set out the genuine original], did then and there fraudulently [and feloniously] alter [8] the same by removing the word "hundred" where it stands between the words "one" and "dollars," and substituting therefor the word "thousand," and by, &c. [proceeding to state all the other alterations; and, if the pleader chooses, or, if the tenor of the alterations has not been thus made absolutely certain, add], so that the said writing thereby

[1] Ante, § 460 and note, and other places.

[2] For other forms, for the forgery and for the uttering, see 3 Chit. Crim. Law, 1046; Rex *v.* Burton, 4 Went. Pl. 32; Reg. *v.* Roberts, 7 Cox C. C. 422; Reg. *v.* Hawkes, 2 Moody, 60; Rex *v.* Marshall, Russ. & Ry. 75; Rex *v.* Chalmers, 1 Moody, 352; Reg. *v.* Winterbottom, 1 Den. C. C. 41, 2 Car. & K. 37, 1 Cox C. C. 164; Rex *v.* Bontien, Russ. & Ry. 260; Reg. *v.* Cropper, 2 Moody, 18; Commonwealth *v.* Castles, 9 Gray, 123; Poage *v.* The State, 3 Ohio State, 229; The State *v.* Davis, 53 Iowa, 252; Commonwealth *v.* Spilman, 124 Mass. 327; The State *v.* Martin, 9 Humph. 55.

[3] Crim. Law, II. § 578.

[4] The State *v.* McLeran, 1 Aikens, 311. And see further of this case, Crim. Law, I. § 806.

[5] Ante, § 458.

[6] Crim. Proced. II. § 419, 446.

[7] Ante, § 460.

[8] Crim. Proced. II. § 426 and note, 446.

became and then and there was of the tenor following [1] [here setting it out in its altered form], with the intent to injure and defraud, &c. [as in the foregoing forms]; against the peace, &c.[2]

§ 475. **Other Forgeries.** — The foregoing forms do not in terms cover every forgery and indictable uttering known to the law; but they furnish the models after which the indictments for the rest may be constructed, and it would be of but slight service to the practitioner to extend the forms over the entire ground. The reader will see, in the note, helpful references to places where other forms may be found.[3]

§ 476. **Stamps and Seals.** — Where the law has provided for

[1] Or, omitting all specifications of the alterations, and going back in the form to the end of the setting out of the genuine original, it is undoubtedly good, though I never saw a precedent so, simply to say, —

Did then and there fraudulently and feloniously alter and change the same to the tenor following.

[2] And see for precedents for the forgery by altering, and for the uttering, Crim. Proced. II. § 446; 3 Chit. Crim. Law, 1047, 1051, 1054, 1079; Rex *v.* Weldon, 4 Went. Pl. 23; Rex *v.* Graham, 4 Went. Pl. 25; Rex *v.* Newman, Trem. P. C. 130; Rex *v.* Post, Russ. & Ry. 101; Commonwealth *v.* Mycall, 2 Mass. 136; Commonwealth *v.* Hayward, 10 Mass. 34; Kahn *v.* The State, 58 Ind. 168; The State *v.* Dourdon, 2 Dev. 443; Mount *v.* Commonwealth, 1 Duv. 90; The State *v.* Bryant, 17 N. H. 323; The State *v.* Martin, 9 Humph. 55; The State *v.* Davis, 53 Iowa, 252; Ream *v.* Commonwealth, 3 S. & R. 207; Harrington *v.* The State, 54 Missis. 490; Commonwealth *v.* Beamish, 31 Smith, Pa. 389; Coleman *v.* Commonwealth, 25 Grat. 865; Respublica *v.* Sweers, 1 Dall. 41, 42.

[3] For forging and uttering **Entries in Books of Account**, — Coleman *v.* Commonwealth, 25 Grat. 865; Commonwealth *v.* Beamish, 31 Smith, Pa. 389; Phelps *v.* People, 6 Hun, 428–432, 72 N. Y. 365; 7 Cox C. C. App. 51. **Public Records**, — Coleman *v.* Commonwealth, supra; Rex *v.* Newman, Trem. P. C. 130; Reg. *v.* Sharpe, 8 Car. & P. 436; Reg. *v.* Powner, 12 Cox C. C. 235; Ream *v.* Commonwealth, 3 S. & R. 207; Harrington *v.* The State, 54 Missis. 490; Brown *v.* People, 86 Ill. 239. **Wills**, — 3 Chit. Crim. Law, 1067, 1069; 4 Went. Pl. 35–41; Rex *v.* Murphy, 19 Howell St. Tr. 694. **Instruments under Seal**, — such as bonds, conveyances of lands, and the like, 3 Chit. Crim. Law, 1063, 1065 *b*, 1066; Rex *v.* Nundocomar, 20 Howell St. Tr. 923; Rex *v.* Dunnett, 2 Leach, 4th ed. 581; Rex *v.* Fauntleroy, 1 Moody, 52; Reg. *v.* Davis, 2 Moody, 177, 9 Car. & P. 427; The State *v.* McGardiner, 1 Ire. 27; The State *v.* Dufour, 63 Ind. 567, 570; The State *v.* Fisher, 65 Misso. 437. **Letter or Warrant of Attorney**, — 3 Chit. Crim. Law, 1065; 6 Went. Pl. 370; Rex *v.* Wordell, Trem. P. C. 132. **Certificate of Character, &c.** — 5 Cox C. C. App. 77; 10 Cox C. C. App. 2; 3 Chit. Crim. Law, 1056; Reg. *v.* Toshack, 1 Den. C. C. 492, 494, 4 Cox C. C. 38; Reg. *v.* Mitchell, 2 Fost. & F. 44; The State *v.* Carr, 25 La. An. 407, 409; Commonwealth *v.* Hinds, 101 Mass. 209. **Transfer of Stock**, — 3 Chit. Crim. Law, 1052; Rex *v.* Gade, 2 Leach, 4th ed. 732. **Order of Magistrate** — to discharge prisoner, Rex *v.* Harris, 1 Moody, 393. **Next Friend**, — consent to be, of infant, Reg. *v.* Smythies, 4 Cox C. C. 94. **Forged Letter**, — passing as true, Waterman *v.* People, 67 Ill. 91. **County Warrant**, — The State *v.* Fenly, 18 Misso. 445, 448. **Railway Pass**, — Reg. *v.* Boult, 2 Car. & K. 604. **Principal and Accessory.** — Against wife as principal and husband as accessory before the fact, Rex *v.* Morris, 2 Leach, 4th ed. 1096, Russ. & Ry. 270. **As Second Offence**, — Vincent *v.* People, 5 Parker C. C. 88, 15 Abb. Pr. 234; Cantor *v.* People, 5 Parker C. C. 217.

stamps and seals to be used on particular occasions, the court judicially knows what are their devices, words, and appearance; and any setting out of them by their tenor, were it possible, would be useless. Hence the indictment for counterfeiting them, or for uttering the counterfeits, is similar to that for the like offences against the coin.[1] It need only allege that the defendant, with the fraudulent intent, counterfeited, or, with knowledge, uttered the counterfeited stamp, seal, or whatever else the thing is, in resemblance of the one provided by law.[2] Or even less will suffice where the statutory limits of the offence are less broad. Thus, under the English statute making one a felon who "shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom,"[3] the two counts[4] given in the English books for the forging and the uttering are simply, —

Forging. — That A, &c. on, &c. at, &c. the great seal of the United Kingdom falsely, deceitfully, and feloniously did forge and counterfeit; against the peace, &c.

Uttering (second count). — And the jurors aforesaid upon their oath aforesaid do further present, that the said A, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, falsely, deceitfully, and feloniously did utter a certain other false, forged, and counterfeited great seal as aforesaid, then and there well knowing the same to be false, forged, and counterfeited; against the peace, &c.[5]

§ 477. **Lost, &c.** — Where the forged writing is lost, destroyed, or in the hands of the defendant, there is no precise form of the allegation which alone will suffice, but it may be, for example, —

A certain writing on paper [*or*, &c.], which said writing is in the possession of the said A [*or* is lost, *or* is destroyed], by reason whereof the jurors are unable to set it out by its tenor, but it is and then and there was in substance as follows [stating its contents in a form to harmonize with the proofs at the trial, and as exactly and minutely as they will permit].[6]

[1] Ante, § 332, &c.

[2] Rex *v.* Collicott, 2 Leach, 4th ed. 1048, Russ. & Ry. 212.

[3] 24 & 25 Vict. c. 98, § 1.

[4] Ante, § 462, 470.

[5] Archb. Crim. Pl. & Ev. 19th ed. 621. For forms for forging, and uttering forged stamps, see 3 Chit. Crim. Law, 1057–1062; Rex *v.* Richardson, 4 Went. Pl. 22; Rex *v.* Palmer, 1 Leach, 4th ed. 352; Rex *v.* Collicott, supra.

[6] Crim. Proced. II. § 404 and notes; People *v.* Badgley, 16 Wend. 53; Chidester *v.* The State, 25 Ohio State, 433; Wallace *v.* People, 27 Ill. 45.

§ 478. **Implements of Forgery.** — The indictment for having in possession the implements of forgery follows the particular statute on which it is constructed, and otherwise conforms to that for thus having the tools for counterfeiting the coin. The statutory terms are so varying that perhaps no separate form here, in addition to the one already given,[1] would be specially helpful.[2] Yet one for taking a photographic "positive" of a foreign note, circulating in the foreign country as money, will be given. The English statute of 24 & 25 Vict. c. 98, § 19, made it felony in one who should, "without lawful authority or excuse, &c. engrave or in any wise make upon any plate whatsoever, &c. any bill of exchange, promissory note, undertaking, or order for payment of money, &c. in whatsoever language the same may be expressed, &c. purporting to be the bill, note, undertaking, &c. of any foreign prince or State." And the following is one of the counts of an indictment which was sustained, — containing, no doubt, many needless words, but its abridgment here is not deemed desirable: —

That in a certain foreign state, that is to say, the empire of Austria, for a long time previously to the commission of the felony and offence hereinafter charged, and at the time when the said felony and offence was committed, and since hitherto and up to the present time, divers undertakings for payment of money of the said foreign state, that is to say, the said empire of Austria, were made, issued, negotiated, and circulated, and were lawfully current in the said foreign state, and that the said undertakings for payment of money were, and each of them respectively was, during all the time aforesaid, made, issued, negotiated, and circulated, and were current as aforesaid, for payment of a certain amount of foreign money, that is to say, for payment of one piece of coin called a gulden of the currency of the said foreign state, to wit, the empire of Austria, the said piece of coin being lawfully current in the said foreign state, and being during all the time aforesaid of great value, to wit, each gulden being of the value of two shillings in English money, and each of the said undertakings for the payment of money being for the payment of one gulden. Whereupon A, &c. well knowing the premises, and whilst the said undertakings were so as aforesaid lawfully current in the said foreign state, on, &c. at, &c. wilfully and feloniously, and without the authority of the said foreign state, and without lawful authority and without lawful excuse, did make upon a

[1] Ante, § 342.

[2] For having in possession plates for forging bank-bills, &c. see Rex *v.* Moses, 7 Car. & P. 423; Rex *v.* Warshaner, 1 Moody, 466; Rex *v.* Hannon, 2 Moody, 77, 9 Car. & P. 11. For engraving on a plate parts of a foreign promissory note in the foreign language, Reg. *v.* Faderman, 4 Cox C. C. 359.

certain plate, to wit, a plate of glass, an undertaking for payment of money, to wit, for payment of one gulden, purporting to be one of the said undertakings for payment of money, of the foreign state aforesaid, to wit, the said empire of Austria, so made, issued, negotiated, and circulated, and lawfully current in the said foreign state as aforesaid; against the peace, &c.[1]

§ 479. **Attempts.** — Utterings of forgeries,[2] having them in possession with the intent to utter them,[3] and possessing and making the implements for forgery,[4] already considered, are attempts and acts in the nature of attempt. No separate forms are here required.[5]

§ 480. **Practical Suggestions.** — This chapter opened with practical suggestions to the prosecuting officer, and they have been continued interspersed through the subsequent sections. Should the proposals for simplifying the indictment be adopted, possibly a few courts may give more than an attentive ear to objections interposed on behalf of defendants. At all events, whatever form the pleader employs, he should qualify himself to sustain it by arguments and authorities before the court. And there can be no question of the success, on the whole, of these reformatory efforts, if duly seconded by prosecuting officers. It is the assurance of this which has induced the author not to encumber his pages with needlessly complicated and otherwise undesirable forms. Those who have occasion for them can find them in the places referred to in the notes.

[1] Reg. *v.* Rinaldi, Leigh & C. 330, 9 Cox C. C. 391. And see Reg. *v.* Faderman, supra.

[2] Ante, § 460, 462, 466, and other places.

[3] Ante, § 467.

[4] Ante, § 478.

[5] See, for forms, The State *v.* Morton, 8 Wis. 352; The State *v.* Watson, 65 Misso. 115, 117; The State *v.* Welsh, 3 Hawks, 404; Jett *v.* Commonwealth, 18 Grat. 933.

For FORNICATION, see ante, § 147 et seq.
FRAUDS, see CHEATS AT COMMON LAW — FALSE PRETENCES — FORGERY — FRAUDULENT CONVEYANCES, &c.
FRAUDULENT BANKRUPTCY, see BANKRUPTCY, &c.

CHAPTER XXXVIII.

FRAUDULENT CONVEYANCES, SALES, AND CONCEALMENTS.[1]

§ 481. **Under 13 Eliz. c. 5.** — This English statute, famous in civil jurisprudence and generally understood to be common law with us, after defining what civil effect shall be given to conveyances made to hinder or defeat creditors, proceeds, in § 3, to make it, among other things, an indictable misdemeanor in "all and every the parties to such feigned, &c. conveyance, . . . and being privy and knowing of the same," to "wittingly and willingly put in ure, avow, maintain, and justify or defend the same" as being true "and upon good consideration."[2] These terms seem to imply that the party must perform some distinct act, or, at least, utter some words, subsequently to the transaction which is visited by the civil consequences defined in the preceding section, in order to incur the criminal liability. Indeed, they appear to make the crime consist in such act or words. But on this question, and on most others relating to the criminal part of this statute, we have no decisions. There is in Wentworth a form for the indictment, in substance, —

That A, &c. B, &c. and C, &c. on, &c. at, &c. did wittingly and willingly put in use,[3] maintain, and justify as true, a certain covinous and fraudulent grant and conveyance of goods and chattels, bearing date[4] the thirty-first day of May, in the year, &c. and made between the said A, by the name and description of, &c.[5] of the one part, and the said B, by the name

[1] For matter relating to this title, see Crim. Law, I. § 572 *a*.

[2] Ib. ut sup.; Cathcart *v.* Robinson, 5 Pet. 264, 280; Gardner *v.* Cole, 21 Iowa, 205; Robinson *v.* Holt, 39 N. H. 557.

[3] "Use" is the word in Wentworth, perhaps by a misprint. But it is "ure" in the statute, and in the indictment in Reg. *v.* Smith, infra. I should employ the latter, but undoubtedly either is good.

[4] This is an objectionable form of the averment; because, under it, the alleged time and the time in the written conveyance must exactly correspond or the variance will be fatal. It is better to say simply, made on such a day, and then the time laid will not be material. Crim. Proced. I. § 486, 488 *a*. This form might be changed to read, "entered into in writing on," &c.

[5] Ante, § 94.

and description of, &c. of the other part, to the end, purpose, and intent [to all of which the said A, B, and C were then and there privy and knowing of the same [1]] to delay, hinder, and defraud one X, then being a creditor of the said A, of his just and lawful debt; against the peace, &c.[2]

§ 482. **Our Similar Statutes.** — Some of our States have statutes similar in purpose; namely, making it punishable for a debtor fraudulently to put his property beyond the reach of creditors, or for another person to help him therein.[3] Their terms are not quite uniform; but the gist of the offence is some form of secreting, so that it is held not to be within the New York statute for one to carry a watch in his pocket and refuse to surrender it to an attaching officer.[4] But the common method of secreting, aimed at by these statutes, is the conveying away or pledging of the property to defraud creditors. Now, —

§ 483. **Indictment.** — There must be an indebtedness, and the indictment must allege it. But the terms of the allegation may be general,[5] as in the precedent under the statute of Elizabeth.[6] Where the statutory words are "fraudulently mortgage, pledge, sell, alienate, or convey any of his real or personal estate amounting in value to the sum of one hundred dollars, . . . to prevent the attachment or seizure of the same upon mesne process or execution," [7] it is believed to be good in averment to say, —

That A, &c. on, &c. at, &c. being the owner of certain real estate there situate, consisting of a lot of land with a dwelling-house thereon, of the

[1] This matter in brackets is not in the precedent before me, but without it one of the clauses of the statute would seem not to be so distinctly covered as it ought.

[2] 6 Went. Pl. 385. The only other precedent on this statute known to me is the indictment in nine counts in Reg. *v.* Smith, 6 Cox C. C. 31. It was held good. But it is needlessly long. It differs from the form in the text chiefly by setting out the particulars of the indebtedness of A to X, and describing more minutely the conveyance. Perhaps such averments are well by way of caution, but I doubt their necessity in strict law.

[3] Concerning these statutes, their interpretation, and the procedure thereon, see, —

Illinois. — Stow *v.* People, 25 Ill. 81; Mathes *v.* Dobschuetz, 72 Ill. 438.

Maine. — The State *v.* Chapman, 68 Maine, 477.

Massachusetts. — Stockwell *v.* Silloway, 113 Mass. 384.

Michigan. — People *v.* Detroit Police Justice, 41 Mich. 224.

New Hampshire. — The State *v.* Leslie, 16 N. H. 93; The State *v.* Robinson, 9 Fost. N. H. 274; The State *v.* Marsh, 36 N. H. 196; The State *v.* Hunkins, 43 N. H. 557.

New York. — People *v.* Morrison, 13 Wend. 399; People *v.* Underwood, 16 Wend. 546; Blason *v.* Bruno, 33 Barb. 520; Loomis *v.* People, 19 Hun, 601.

[4] People *v.* Morrison, 13 Wend. 399.

[5] Loomis *v.* People, 19 Hun, 601; The State *v.* Robinson, 9 Fost. N. H. 274.

[6] Ante, § 481.

[7] The State *v.* Leslie, 16 N. H. 93. For the similar New York statute see People *v.* Underwood, 16 Wend. 546.

value of more than one hundred dollars, to wit, of the value of two thousand dollars, and being then and there indebted to X [in the sum of one thousand dollars [1]], did then and there fraudulently sell, alienate, and convey the said real estate to Y, with the intent thereby to prevent the attachment and seizure of the same on mesne process, and on execution, for enforcing the payment of said indebtedness; against the peace, &c.[2]

§ 484. **Selling, &c. Property Mortgaged, &c.** — Different in purpose are statutes, prevailing in considerable numbers of our States, to punish the selling, removing, secreting, or the like, of real and personal property mortgaged or under a lien, or selling it without disclosing the facts. The terms of these provisions differ; they sufficiently appear, with various constructions, in the cases cited in the note.[3] If, by the terms of the statute, the offence consists in selling the mortgaged property for the purpose of hindering, delaying, or defrauding the mortgagee, a mortgagor does not commit it who, under the fairly induced belief that he has the consent of the mortgagee, makes the sale to pay the mortgage debt.[4]

§ 485. **Indictment.** — The indictment must cover the statutory language; as, for example, aver the mortgage or other lien to be "in writing," if so is the statute.[5] And it must cover the meaning of the statute; as, by alleging that the mortgage or other lien is subsisting, or remains unsatisfied.[6] Under a provision to punish one who, "with a fraudulent intent to place mortgaged

[1] I should think this matter in brackets might be deemed necessary in a State where a levy could not be made on real property unless the judgment or execution amounted to a specified sum. But in other circumstances I can see no occasion for it. Compare with the form ante, § 481.

[2] For other forms, see The State *v.* Leslie, supra; The State *v.* Robinson, supra; The State *v.* Hunkins, 43 N. H. 557; Loomis *v.* People, supra.

[3] *Alabama.* — Nixon *v.* The State, 55 Ala. 120; Glenn *v.* The State, 60 Ala. 104; Atwell *v.* The State, 63 Ala. 61.

Arkansas. — Cooper *v.* The State, 37 Ark. 412; Cooper *v.* The State, 37 Ark. 421.

Iowa. — The State *v.* Julien, 48 Iowa, 445; The State *v.* Gustafson, 50 Iowa, 194; The State *v.* Stevenson, 52 Iowa, 701.

Massachusetts. — Commonwealth *v.* Brown, 15 Gray, 189; Commonwealth *v.* Wallace, 108 Mass. 12; Commonwealth *v.* Williams, 127 Mass. 285; Commonwealth *v.* Harriman, 127 Mass. 287.

Minnesota. — The State *v.* Ruhnke, 27 Minn. 309.

Missouri. — The State *v.* Jones, 68 Misso. 197.

North Carolina. — The State *v.* Pickens, 79 N. C. 652; The State *v.* Burns, 80 N. C. 376.

Texas. — The State *v.* Small, 31 Texas, 184; The State *v.* Devereaux, 41 Texas, 383; Robberson *v.* The State, 3 Texas Ap. 502; Moye *v.* The State, 9 Texas Ap. 88.

[4] Atwell *v.* The State, 63 Ala. 61. And see Commonwealth *v.* Harriman, 127 Mass. 287.

[5] Moye *v.* The State, 9 Texas Ap. 88.

[6] Satchell *v.* The State, 1 Texas Ap. 438; The State *v.* Burns, 80 N. C. 376. See The State *v.* Gustafson, 50 Iowa, 194.

personal property beyond the control of the mortgagee, removes or conceals, &c. the same," [1] the indictment may charge, —

That A, &c. on, &c. at, &c. did mortgage to X, in due form of law, one horse, &c. [setting out the mortgaged property], and that afterward, on, &c. [the pleader will commonly elect to make this date subsequent to the other if the fact is so, though doubtless this is not necessary], at, &c. the said mortgage being in full force and the said X remaining the owner thereof, he the said A did, to cheat and injure the said X, fraudulently remove and conceal the said mortgaged personal property, with the fraudulent intent to place the same beyond the control of the said X; against the peace, &c.[2]

§ 486. **Conveying Land without Title.** — A statute subjecting to imprisonment one who "knowingly sells or conveys any land, or any interest therein, without having title to the same, either in law or equity, by descent, devise, written contract, or deed of conveyance, with intent to defraud," applies as well to lands lying without as within the State. The indictment may aver, —

That A, &c. on, &c. at, &c. did, with intent to defraud X, knowingly sell and convey to him, by deed, a certain tract of land, &c. [describing it], situate at, &c. he the said A not then and there having, and knowing himself not then and there to have, title to the same in law, or equity, by descent, devise, written contract, or deed of conveyance; against the peace, &c.[3]

[1] Mass. Gen. Stats. c. 161, § 61.

[2] Partly following the precedent in Commonwealth *v.* Wallace, 108 Mass. 12. And see, for other forms, Satchell *v.* The State, supra; Cooper *v.* The State, 37 Ark. 412; Cooper *v.* The State, 37 Ark. 421; The State *v.* Ruhnke, 27 Minn. 309; The State *v.* Devereaux, 41 Texas, 383; The State *v.* Pickens, 79 N. C. 652. For giving a deed without mentioning incumbrance, Commonwealth *v.* Brown, 15 Gray, 189; Commonwealth *v.* Williams, 127 Mass. 285; The State *v.* Jones, 68 Misso. 197. In Alabama it satisfies the code to allege, —

That, before the finding of this indictment, A, &c. did remove, conceal, or sell a horse, the personal property of, &c. for the purpose of hindering, delaying, or defrauding the said, &c. who had a claim to said horse, under a written instrument, to wit, a mortgage; against the peace, &c.

So is the indictment in Glenn *v.* The State, 60 Ala. 104. And for other forms see Nixon *v.* The State, 55 Ala. 120; Atwell *v.* The State, 63 Ala. 61. The Iowa statute differs from the others considered in this connection. It is: "If any mortgagor of personal property, while his mortgage of it remains unsatisfied, wilfully destroy, conceal, sell, or in any manner dispose of the property covered by such mortgage, without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny and punished accordingly." For a form under it, see The State *v.* Gustafson, 50 Iowa, 194. And see The State *v.* Julien, 48 Iowa, 445. And consult the title EMBEZZLEMENT, ante, § 401 et seq.

[3] Kerr *v.* The State, 36 Ohio State, 614, 621. "Or," not "and," is the proper conjunction in these negative averments. Ante, § 124 and note.

§ 487. **Twice Selling Land.** — Under a statute to punish one who, "after once selling," &c. any land, "shall again knowingly and fraudulently sell, &c. the same tract or tracts of land, &c. to any other person or persons for a valuable consideration," the indictment may charge, —

That A, &c. on, &c. at, &c. did bargain, sell, and convey to M three tracts of land, &c. [describing them]; whereupon he the said A did afterward, on, &c. at, &c. with the intent to cheat and defraud X, knowingly and fraudulently bargain, sell, and in form of law convey to the said X, for a valuable consideration, to wit, for two thousand dollars, paid by the said X to the said A, the same tracts of land; against the peace, &c.[1]

[1] People *v.* Garnett, 35 Cal. 470.

For FRAUDULENT INSOLVENCY, see BANKRUPTCY AND INSOLVENCY.
FURIOUS DRIVING, see HORSE-RACING, &c.
GAME, see FISH AND GAME.

CHAPTER XXXIX.

GAMING.[1]

§ 488. **Elsewhere.** — In this volume, and in the other volumes of the series, the nuisance of keeping a gaming-house is treated of under a separate title from Gaming. Its treatment constitutes, in the present volume, a sub-title under "Nuisance."

§ 489. **Formula for Indictment.** — The statutes are so diverse as to render any formula for the indictment on them unavailing to the practitioner except in the way of general suggestion. Therefore only an incomplete outline will be attempted, so that the pleader's resort will be chiefly to the special forms further on. The allegations may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did unlawfully[2] play at a certain game of cards[3] [*or*, &c. following the statutory terms] for money,[4] &c. [follow here also the statutory words], with X[5] [*or*, did win, &c. *or* fraudulently win, &c. *or* lose, &c. following the statute; *or*, did bet, &c. on the hands and games, &c. following the statute; *or*, having under his control a certain building, &c. did unlawfully suffer and permit, &c. therein, &c. pursuing the statutory terms; *or*, &c. following whatever other statutory provision is being proceeded upon, and expanding the allegation beyond the words when the rules of good pleading require[6]]; against the peace, &c. [ante, § 66–69].[7]

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Stat. Crimes, § 844–930. Incidental, Crim. Law, I. § 504; Crim. Proced. I. § 241, 374, 476, 639, note, 641, note; Stat. Crimes, § 55, 135, 221, 294, 298, 299, 936. And see the title GAMING-HOUSE, in this volume it is a sub-title under NUISANCE.

[2] Here the offence is assumed to be, what it generally is, a misdemeanor. Stat. Crimes, § 880. If it is felony, add "and feloniously."

[3] As to naming the game, &c. see Stat. Crimes, § 897.

[4] Stat. Crimes, § 901.

[5] The name of the person played with not universally held to be necessary. Stat. Crimes, § 894.

[6] Stat. Crimes, § 909.

[7] For forms, see Archb. Crim. Pl. & Ev. 19th ed. 989; 5 Cox C. C. App. 47; 3 Chit. Crim. Law, 677–681; 4 Went. Pl. 355; 6 Ib. 383, 391, 432; Fowler *v.* Alsop, Trem. P. C. 263; Rex *v.* Clarke, Cowp. 35; Rex *v.* Darley, 4 East, 174; Reg. *v.* Bailey, 4 Cox C. C. 390; Reg. *v.* Moss, Dears. & B. 104, 7 Cox C. C. 200; Morley *v.* Greenhalgh, 3 B. & S. 374.

Alabama. — Covy *v.* The State, 4 Port.

§ 490. **Playing for Money.** — A statute having made punishable one who "shall play at any game or games at cards, &c. for

186; Coggins *v.* The State, 7 Port. 263; The State *v.* Whitworth, 8 Port. 434; The State *v.* Atkyns, 1 Ala. 180; Clark *v.* The State, 19 Ala. 552; Burdine *v.* The State, 25 Ala. 60; Rodgers *v.* The State, 26 Ala. 76; Harris *v.* The State, 31 Ala. 362; Eslava *v.* The State, 44 Ala. 406, 408; Schuster *v.* The State, 48 Ala. 199; Napier *v.* The State, 50 Ala. 168; Ray *v.* The State, 50 Ala. 172; McInnis *v.* The State, 51 Ala. 23; Campbell *v.* The State, 55 Ala. 89; Jacobson *v.* The State, 55 Ala. 151; Mitchell *v.* The State, 55 Ala. 160; Henderson *v.* The State, 59 Ala. 89, 90; Sikes *v.* The State, 67 Ala. 77.

Arkansas. — Graham *v.* The State, 1 Pike, 171, 173; Hany *v.* The State, 4 Eng. 193; Drew *v.* The State, 5 Eng. 82; Brown *v.* The State, 5 Eng. 607; Moffatt *v.* The State, 6 Eng. 169; Warren *v.* The State, 18 Ark. 195, 198; Orr *v.* The State, 18 Ark. 540; The State *v.* Holland, 22 Ark 242; The State *v.* Anderson, 30 Ark. 131; Cohen *v.* The State, 32 Ark. 226; The State *v.* Jeffrey, 33 Ark. 136; The State *v.* Hunn, 34 Ark. 321, 322; The State *v.* Lindsay, 34 Ark. 372; Enper *v.* The State, 35 Ark. 629; Brockway *v.* The State, 36 Ark. 629.

California. — People *v.* Saviers, 14 Cal. 29.

Colorado. — Chase *v.* People, 2 Col. Ter. 509.

Georgia. — Brown *v* The State, 40 Ga. 689.

Illinois. — Gibbons *v.* People, 33 Ill. 442.

Indiana. — Webster *v.* The State, 8 Blackf. 490; Iscley *v.* The State, 8 Blackf. 403; Mount *v.* The State, 7 Ind. 654; The State *v.* Hope, 15 Ind. 474; Hamilton *v.* The State, 25 Ind. 426; The State *v.* Thomas, 50 Ind. 292; Donniger *v.* The State, 52 Ind. 326; Hanrahan *v.* The State, 57 Ind. 527; The State *v.* Ward, 57 Ind. 537; Enwright *v.* The State, 58 Ind. 567; The State *v.* Newton, 59 Ind. 173; Ready *v.* The State, 62 Ind. 1; Powell *v.* The State, 62 Ind. 531; Howard *v.* The State, 64 Ind. 516; Moore *v.* The State, 65 Ind. 213; Manheim *v.* The State, 66 Ind. 65; Padgett *v.* The State, 68 Ind. 46; The State *v.* Allen, 69 Ind. 124; The State *v.* Pancake, 74 Ind. 15; Sumner *v.* The State, 74 Ind. 52; Hamilton *v.* The State, 75 Ind. 586.

Iowa. — The State *v.* Nichols, 5 Iowa, 413; The State *v.* Middleton, 11 Iowa, 246; The State *v.* Book, 41 Iowa, 550; The State *v.* Kaufman, 59 Iowa, 273.

Kansas. — Rice *v.* The State, 3 Kan. 141, 156; The State *v.* Stillwell, 16 Kan. 24.

Kentucky. — Montee *v.* Commonwealth, 3 J. J. Mar. 132; Commonwealth *v.* Perrigo, 3 Met. Ky. 5; Commonwealth *v.* Monarch, 6 Bush, 298.

Maryland. — Baker *v.* The State, 2 Har. & J. 5; The State *v.* Price, 12 Gill & J. 260; Wheeler *v.* The State, 42 Md. 563.

Massachusetts. — Commonwealth *v.* Bolkom, 3 Pick. 281; Commonwealth *v.* Arnold, 4 Pick. 251; Commonweath *v.* Goding, 3 Met. 130; Commonwealth *v.* Tilton, 8 Met. 232; Commonwealth *v.* Stowell, 9 Met. 572; Commonwealth *v.* Drew, 3 Cush. 279; Commonwealth *v.* Pattee, 12 Cush. 501; Commonwealth *v.* Colton, 8 Gray, 488; Commonwealth *v.* Crawford, 9 Gray, 128; Commonwealth *v.* Parker, 117 Mass. 112; Commonwealth *v.* Gaming Implements, 119 Mass. 332, 336; Fitzgerald *v.* Commonwealth, 135 Mass. 266.

Mississippi. — Johnston *v.* The State, 7 Sm. & M. 58; Strawhern *v.* The State, 37 Missis. 422, 426.

Missouri. — The State *v.* Ames, 1 Misso. 524; The State *v.* Purdom, 3 Misso. 114; The State *v.* Mitchell, 6 Misso. 147; The State *v.* Kyle, 10 Misso. 389; The State *v.* Ames, 10 Misso. 743; The State *v.* Kesslering, 12 Misso. 565; The State *v.* Nelson, 19 Misso. 393; The State *v.* Fulton, 19 Misso. 680; The State *v.* Flack, 24 Misso. 378; The State *v.* Scaggs, 33 Misso. 92; The State *v.* Stogsdale, 67 Misso. 630.

New Hampshire. — The State *v.* Leighton, 3 Fost. N. H. 167; The State *v.* Stearns, 11 Fost. N. H. 106; The State *v.* Prescott, 33 N. H. 212.

New Mexico. — Territory *v.* Copely, 1 New Mex. 571.

North Carolina. — The State *v.* Hix, 3 Dev. 116; The State *v.* Ritchie, 2 Dev. &

money," and another statute having declared it to be sufficient for the indictment to charge the general name of the game without saying against whom the defendant played, it was adjudged adequate simply to aver, —

That A, &c. on, &c. at, &c. did play at a game at cards for money;[1] against the peace, &c.[2]

§ 491. **As to which — Another.** — Without the aid of the statute simplifying the indictment, it is believed that a form which thus omits to state the nature of the game, with whom played, or in any other way to identify the particular instance, would be too meagre; though the mere omission of the name of the person played with, where there was other adequate identifying matter, would not, before all courts, be fatal.[3] Under the statutory words "play at any game whatsoever, for any sum of money, or other property of any value," an indictment omitting the name of the person played with, but with other particularization, was sustained. Thus, —

Bat. 29; The State *v.* Terry, 4 Dev. & Bat. 185; The State *v.* Langford, 3 Ire. 354.

Ohio. — Davis *v.* The State, 7 Ohio, 204; Davis *v.* The State, 19 Ohio State, 270; Carper *v.* The State, 27 Ohio State, 572; Davis *v.* The State, 32 Ohio State, 24; Roberts *v.* The State, 32 Ohio State, 171.

Oregon. — The State *v.* Carr, 6 Oregon, 133; The State *v.* Gitt Lee, 6 Oregon, 425.

Pennsylvania. — Commonwealth *v.* Carson, 6 Philad. 381.

Rhode Island. — The State *v.* Melville, 11 R. I. 417.

Tennessee. — Dean *v.* The State, Mart. & Yerg. 127, Johnston *v.* The State, Mart. & Yerg. 129; Anthony *v.* The State, 4 Humph. 83; The State *v.* McBride, 8 Humph. 66; Johnson *v.* The State, 4 Sneed, 614.

Texas. — Bailey *v.* The State, 2 Texas, 202; The State *v.* Ward, 9 Texas, 370; Royal *v.* The State, 9 Texas, 449; Barker *v.* The State, 12 Texas, 273; The State *v.* Lopez, 18 Texas, 33; The State *v.* Blair, 41 Texas, 30, 31; The State *v.* Bullion, 42 Texas, 77; Reed *v.* The State, 1 Texas Ap. 1; Chiles *v.* The State, 1 Texas Ap. 27, 28; Sheppard *v.* The State, 1 Texas Ap. 304; Ben *v.* The State, 9 Texas Ap. 107, 108; Anderson *v.* The State, 9 Texas Ap. 177; Harris *v.* The State, 9 Texas Ap. 308; O'Brien *v.* The State, 10 Texas Ap. 544; Scribner *v.* The State, 12 Texas Ap. 173; Reeves *v.* The State, 12 Texas Ap. 199; Wallace *v.* The State, 12 Texas Ap. 479.

Virginia. — Commonwealth *v.* Offener, 2 Va. Cas. 17; Roberts *v.* Commonwealth, 10 Leigh, 686; Day *v.* Commonwealth, 23 Grat. 915; Leath *v.* Commonwealth, 32 Grat. 873; Nuckolls *v.* Commonwealth, 32 Grat. 884.

Wisconsin. — Gallagher *v.* The State, 26 Wis. 423.

Wyoming. — Fields *v.* Territory, 1 Wy. Ter. 78.

United States. — District of Columbia. United States *v.* Simms, 1 Cranch C. C. 252.

[1] **Money.** — As to alleging the thing played for to be "money," see ante, § 248 and note, 250, notes, 395 and note; Stat. Crimes, § 874, 898, 899, 901.

[2] Johnston *v.* The State, 7 Sm. & M. 58. And compare with form in Strawhen *v.* The State, 37 Missis. 422, 426; People *v.* Saviers, 14 Cal. 29.

[3] Stat. Crimes, § 894–897, 922, 923, 925.

That A, &c. on, &c. at, &c. did unlawfully play [1] at a certain game called poker, for a large sum of money,[2] to wit, for the sum of two dollars, by means of a certain gaming device, to wit, a pack of cards; against the peace, &c.[3]

§ 492. **Playing for "Valuable Thing."** — Under a statute which "makes it a penal offence for any person to play for money or other valuable thing at any game with cards, dice, checks, or at billiards," if the things played for were checks practically but not legally redeemable,[4] the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully play at a game of billiards [with, &c.[5]] for certain checks and promissory notes, payable and redeemable, &c. the same being then and there valuable things, of the value of, &c.; against the peace, &c.[6]

§ 493. **In Particular Place — ("Public Place" — "Storehouse," &c.).** — How the place should be described we saw elsewhere.[7] The form may be, —

That A, &c. on, &c. at, &c. did, &c. [setting out the offence as in the last three forms], in a certain highway there [*or*, in a certain storehouse there; *or*, in a certain outhouse there; *or*, in a storehouse there wherein then and there spirituous liquors were sold; *or*, in the public place and room in the City Hall there wherein the mayor and aldermen habitually meet for the transaction of public business; *or*, &c. varying the allegation with the statute and the particular facts]; against the peace, &c.[8]

§ 494. **Professional Gambler — (Habitual Gaming, &c.).** — The statutes creating this offence [9] are in varying terms. Under the provision that one who "shall, &c. or shall frequent any place

[1] In the absence of any decision in the particular State, it will be safer to insert here "with X." Stat. Crimes, § 894, 923.

[2] See the note to the last section.

[3] Roberts *v.* The State, 32 Ohio State, 171. And for other forms on similar statutes, see Rex *v.* Clarke, Cowp. 35; Roberts *v.* Commonwealth, 10 Leigh, 686; Royal *v.* The State, 9 Texas, 449.

[4] Stat. Crimes, § 875, 900.

[5] See note to the last form.

[6] Gibbons *v.* People, 33 Ill. 442.

[7] Stat. Crimes, § 902–906.

[8] For forms, see The State *v.* Ward, 9 Texas, 370; The State *v.* Lopez, 18 Texas, 33; Sheppard *v.* The State, 1 Texas Ap. 304; Scribner *v.* The State, 12 Texas Ap. 173; Coggins *v.* The State, 7 Port. 263; The State *v.* Atkyns, 1 Ala. 180; Burdine *v.* The State, 25 Ala. 60. In Alabama, the Code permits forms which would be wholly inadequate under the common-law rules. Thus, in this case of Burdine *v.* The State, it was adjudged good to say, —

That A, &c. and B, &c. before the finding of this indictment, at, &c. played at a game with cards, or dice, or at some device or substitute therefor, at a tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were, at the time, retailed or given away, or at a public house, highway, or at some other public place, or at an outhouse where people resorted; against the peace, &c.

[9] Stat. Crimes, § 853, 854, 879.

where gambling is permitted, shall be deemed a professional gambler," it is not necessary for the indictment to aver the conclusion of law that the defendant became a professional gambler.[1] It may charge, —

That A, &c. on, &c. [as at ante, § 80, and, if the pleader chooses, with the continuando as at ante, § 83], at, &c. did [for the purpose of gaming with cards [2]], unlawfully frequent a certain room occupied by X, in a building called the M House, in which room gambling was there [during all the time aforesaid, ante, § 84] permitted and carried on; against the peace, &c.[3]

§ 495. **Another — (Common Gambler).** — Under the provision that one "who shall be guilty of dealing faro, or banking for others to deal faro, or acting as lookout, game-keeper, or assistant for the game of faro, or any other banking game where money or property is dependent on the result, shall be taken and held to be a common gambler," it is good to allege, —

That A, &c. on, &c. at, &c. did deal faro, a certain banking game where money and other property were then and there dependent on the result [whereby, and by force of the statute in such case made and provided, the said A was then and there taken and held to be a common gambler [4]]; against the peace, &c.[5]

§ 496. **Fraudulent Winning.** — The elements of the indictment under the statute of Anne are stated elsewhere.[6] There are statutes in terms somewhat different; as, for example, 8 & 9 Vict. c. 109, § 17, provides, among other things, that one who "shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, . . . win from any other person, to himself or to any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same; and, being convicted thereof, shall be punished accord-

[1] Crim. Proced. I. § 515; post, § 496.

[2] These words are in the form before me, but I doubt their necessity. One would seem to be within the statute who should frequent the place as a mere looker-on.

[3] Howard *v.* The State, 64 Ind. 516; The State *v.* Thomas, 50 Ind. 292. For other forms, see Hamilton *v.* The State, 25 Ind. 426; The State *v.* Allen, 69 Ind. 124.

[4] This matter in brackets is in the form before me. That it is not necessary, see ante, § 494 and note.

[5] The State *v.* Melville, 11 R. I. 417.

[6] Stat. Crimes, § 885. And see further, for forms, ante, § 274; 6 Went. Pl. 391, 392; 3 Chit. Crim. Law, 678–681; 5 Cox C. C. App. 47.

ingly." There are precedents[1] for weaving into the indictment this false pretence clause as the larceny clause is woven into the indictment for embezzlement.[2] But there is no just ground for requiring this, and forms without it have been sustained,[3] and beyond reasonable question they are in principle good.[4] The averments may be, —

That A, &c. on, &c. at, &c. did, by fraud, unlawful device, and ill practice in playing at and with cards, unlawfully win from one X, to a certain person whose name is to the jurors unknown, a certain sum of money [of the property of the said X[5]], with intent to cheat him the said X of the same [to the great damage of the said X, to the evil example of all others in the like case offending[6]]; against the peace, &c.[7]

§ 497. **Losing or Winning.** — Some of the statutes, excluding the element of fraud, make punishable, for example, one "who shall, by playing or betting at or upon any game or wager whatever, either lose or win any article of value." And it is good in averment to say, —

That A, &c. on, &c. at, &c. did unlawfully win [*or* lose] of [*or* to] one X a certain hat of the value of three dollars, by then and there unlawfully betting and wagering the same against another hat upon a game of tenpins then and there had and played between the said A and the said X; against the peace, &c.[8]

§ 498. **Same at one Sitting, &c.** — sufficiently explained elsewhere.[9]

§ 499. **Keeping Gaming Device.** — There are statutes, in various terms, to punish this sort of offence. The indictment need only cover the words and meaning of the particular enactment;[10] as, for example, under the phrase "shall be the keeper of any gaming apparatus for the purpose of winning or gaining any article of value," the allegations may be, —

[1] Archb. Crim. Pl. & Ev. 19th ed. 989; Reg. *v.* Bailey, 4 Cox C. C. 390.

[2] Ante, § 401–403.

[3] Reg. *v.* Moss, Dears. & B. 104, 7 Cox C. C. 200.

[4] Ante, § 494; Crim. Proced. II. § 318, and the places there referred to.

[5] Some may deem these words in brackets to be necessary. The indictment in Reg. *v.* Moss, supra, was objected to after verdict for not containing them, but the court overruled the objection.

[6] Not necessary. Ante, § 48.

[7] Reg. *v.* Moss, supra. And for other forms, see the places already referred to in this section. Massachusetts statute and form, Commonwealth *v.* Parker, 117 Mass. 112; Fitzgerald *v.* Commonwealth, 135 Mass. 266.

[8] Mount *v.* The State, 7 Ind. 654; Webster *v.* The State, 8 Blackf. 400.

[9] Stat. Crimes, § 887; and, for other forms for this, see 4 Went. Pl. 355; 6 Ib. 383; 3 Chit. Crim. Law, 679, 680.

[10] Stat. Crimes, § 890.

That A, &c. on, &c. at, &c. did unlawfully [and feloniously] keep a certain gaming apparatus, commonly called a wheel of fortune, then and there to play for, win, and gain money and other articles of value, by then and there playing a certain game commonly called a game of fortune; against the peace, &c.[1]

§ 500. **Another.** — Or the allegation, if so it covers the statutory words, may be, —

That, &c. [as above] unlawfully did permit a certain gambling device called a pack of cards, being a gambling device adapted, used, and designed for playing games of chance for money and other property, &c., against the peace, &c.[2]

§ 501. **Another.** — Or, under the statutory expression "keeping any E O table, or any other kind of gaming table (billiard tables excepted) at which the game of faro, equality, or any other game of chance shall be played for money," the averments, by implication negativing the exception of the statute, will suffice, —

That A, &c. [as above] unlawfully did keep a certain gaming table called a faro table, at which gaming table so unlawfully kept the game of faro was then and there unlawfully played for money; against the peace, &c.[3]

§ 502. **Another.** — Or, under a statute differently expressed, —

That A, &c. [as above] unlawfully did keep and exhibit gaming tables called A B C or E O tables, faro bank, wheel of fortune, keno table, and tables of the like kind being under denominations to the jurors unknown, the games played on said tables being then and there played with cards; against the peace, &c.[4]

§ 503. **Permitting Gaming.** — This form of the offence rests on variously worded statutes;[5] as, for example, making it a misde-

[1] The State *v.* Thomas, 50 Ind. 292. For other forms, see places referred to post, § 502, note.

[2] The State *v.* Seaggs, 33 Misso. 92. For other forms, see places referred to post, § 502, note.

[3] The State *v.* Price, 12 Gill & J. 260. For other forms, see places referred to post, § 502, note.

[4] Leath *v.* Commonwealth, 32 Grat. 873. And, for other forms similar to these four, see Baker *v.* The State, 2 Har. & J. 5; Sumner *v.* The State, 74 Ind. 52; The State *v.* Stogsdale, 67 Misso. 630; Territory *v.* Copely, 1 New Mex. 571; The State *v.* Newton, 59 Ind. 173; Fowler *v.* Alsop, Trem. P. C. 263; Commonwealth *v.* Monarch, 6 Bush, 298; Montee *v.* Commonwealth, 3 J. J. Mar. 132; The State *v.* Hope, 15 Ind. 474; The State *v.* Ames, 10 Misso. 743; The State *v.* Kesslering, 12 Misso. 565; The State *v.* Nelson, 19 Misso. 393; The State *v.* Fulton, 19 Misso. 680; Davis *v.* The State, 19 Ohio State, 270; Harris *v.* The State, 9 Texas Ap. 308; Davis *v.* The State, 32 Ohio State, 24; Reeves *v.* The State, 12 Texas Ap. 199; Gallagher *v.* The State, 26 Wis. 423; The State *v.* Whitworth, 8 Port. 434; Commonwealth *v.* Tilton, 8 Met. 232.

[5] Stat. Crimes, § 889–892, 895.

meanor for one to "permit or suffer any person, in any house, shop, or other place under his control or care, to play at cards, faro, roulette, equality, or other game, for money or other thing." Upon these statutory terms the indictment may allege, —

That A, &c. on, &c. at, &c. did, in a certain house [*or* shop, *or* tent, &c.] there, and then under his control and care, permit and suffer X, Y, Z, &c. [*or*, divers persons to the jurors unknown; *or*, X, Y, and divers other persons to the jurors unknown] to play [proceeding to state the facts of the particular case in the statutory language; as] at cards, dice, dominoes, and other games for money, cigars, beer, and other things [1] [*or*, under a statute differently worded, X to keep and exhibit a certain gaming bank, commonly called a chuck-luck bank, for the purpose of gaming and obtaining bets thereon; [2] *or*, a certain gambling device, commonly called pico, adapted, devised, and designed for playing a game of chance at which money and other property may be won and lost; [3] *or*, a certain gambling device commonly called cards, adapted, devised, and designed for the purpose of playing at games of chance for money and other property, and did then and there knowingly, wilfully, and unlawfully suffer games of chance to be played at and upon said gambling device for money and other property, upon which said games money was then and there bet, won, and lost [4]]; against the peace, &c.[5]

§ 504. **Minors to play.** — The indictment for permitting minors to play at games on one's premises or appliances will follow these forms, adding the averment of their minority.[6]

§ 505. **Minors to congregate.** — Under a provision to punish

[1] The State *v.* Kaufman, 59 Iowa, 273. And for other forms see The State *v.* Book, 41 Iowa, 550; The State *v.* Middleton, 11 Iowa, 246.

[2] Reed *v.* The State, 1 Texas Ap. 1; The State *v.* Bullion, 42 Texas, 77; O'Brien *v.* The State, 10 Texas Ap. 544; Wallace *v.* The State, 12 Texas Ap. 479.

[3] Euper *v.* The State, 35 Ark. 629; Brockway *v.* The State, 36 Ark. 629.

[4] The State *v.* Mitchell, 6 Misso. 147; The State *v.* Fulton, 19 Misso. 680.

[5] For other forms, see Rice *v.* The State, 3 Kan. 141, 156; Brown *v.* The State, 40 Ga. 689; United States *v.* Simms, 1 Cranch C. C. 252; Day *v.* Commonwealth, 23 Grat. 915; Davis *v.* The State, 7 Ohio, 204; Commonwealth *v.* Perrigo, 3 Met. Ky. 5; McInnis *v.* The State, 51 Ala. 23; The State *v.* Pancake, 74 Ind. 15; Hamilton *v.* The State, 75 Ind. 586; Campbell *v.* The State, 55 Ala. 89; Covy *v.* The State, 4 Port. 186. **Massachusetts.** — Under some Massachusetts statutes, differing more or less from those on which the foregoing forms are constructed, precedents may be found in the following cases: Commonwealth *v.* Bolkom, 3 Pick. 281; Commonwealth *v.* Arnold, 4 Pick. 251; Commonwealth *v.* Goding, 3 Met. 130; Commonwealth *v.* Stowell, 9 Met. 572; Commonwealth *v.* Drew, 3 Cush. 279; Commonwealth *v.* Pattee, 12 Cush. 501; Commonwealth *v.* Colton, 8 Gray, 488; Commonwealth *v.* Crawford, 9 Gray, 128.

[6] And, for more specific directions, see Stat. Crimes, § 889. For forms, see Powell *v.* The State, 62 Ind. 531; Moore *v.* The State, 65 Ind. 213; Ready *v.* The State, 62 Ind. 1; The State *v.* Ward, 57 Ind. 537; Hanrahan *v.* The State, 57 Ind. 527; Donniger *v.* The State, 52 Ind. 326; Sikes *v.* The State, 67 Ala. 77.

"any person, owning or having the care, management, or control of any billiard table or tables, bagatelle table or pigeon-hole table kept in any saloon, hotel, or other public place, who shall suffer or permit minors to congregate at, in, and about such place where such billiard table or tables, bagatelle table, or pigeon-hole table may be kept," the allegations may be, —

That A, &c. on, &c. [adding the continuando as at ante, § 83, or not, as the pleader chooses [1]], at, &c. having the care, management, and control of certain billiard tables then and there kept in a public billiard hall, did then and there unlawfully suffer and permit X, Y, Z, &c. persons who then and there were severally minors under the age of twenty-one years, to then and there unlawfully congregate, at, in, and about said public billiard hall, wherein said billiard tables were so kept; against the peace, &c.[2]

§ 506. **Betting on Games, &c.**[3] — Under a statute which, after forbidding people to "set up, keep, or exhibit any gaming-table or gambling device, commonly called A B C, E O, roulette, rouge et noir, or any faro-bank," &c., makes it a misdemeanor for any person to bet "on any of the games" thus prohibited, the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully bet [with X [4]] one dollar in money, and other things then and there treated as money [5] [*or* ten checks of the representative value of five dollars, *or* one hat of the value [6] of five dollars], upon a certain gambling device then and there exhibited, commonly called a faro-bank [*or*, under a statute differently worded, upon a certain game of cards, &c.[7] then and there being played between M and N [8]]; against the peace, &c.[9]

[1] Ante, § 81.

[2] Manheim *v.* The State, 66 Ind. 65.

[3] And compare with ante, § 395–398. For explanations, see Stat. Crimes, § 918–926.

[4] Required in only a part of the States. Stat. Crimes, § 923.

[5] Ante, § 248 and note, 395 and note.

[6] As to the necessity of alleging value, see ante, § 395 and note.

[7] Stat. Crimes, § 926.

[8] Not necessary in all circumstances, or in all the States, to name the players. Stat. Crimes, § 894.

[9] For various forms under the differing statutes, see Warren *v.* The State, 18 Ark. 195; The State *v.* Holland, 22 Ark. 242; Drew *v.* The State, 5 Eng. 82; Cohen *v.* The State, 32 Ark. 226; The State *v.* Hunn, 34 Ark. 321, 322; Orr *v.* The State, 18 Ark. 540; Moffatt *v.* The State, 6 Eng. 169; Hany *v.* The State, 4 Eng. 193; Graham *v.* The State, 1 Pike, 171, 173; Iscley *v.* The State, 8 Blackf. 403; The State *v.* Nichols, 5 Iowa, 413; The State *v.* Ames, 1 Misso 524; The State *v.* Kyle, 10 Misso. 389; Johnston *v.* The State, Mart. & Yerg. 129; Anthony *v.* The State, 4 Humph. 83; The State *v.* McBride, 8 Humph. 66; Johnson *v.* The State, 4 Sneed, 614; Bailey *v.* The State, 2 Texas, 202; Barker *v.* The State, 12 Texas, 273; Chiles *v.* The State, 1 Texas Ap. 27, 28; Ben *v.* The State, 9 Texas Ap. 107, 108; Anderson *v.* The State, 9 Texas Ap. 177; Commonwealth *v.* Offener, 2 Va. Cas. 17. **Alabama.** — The Alabama statutes permit forms which do not satisfy

§ 507. **Other Forms** — will be required in practice, but none which cannot readily be constructed from the foregoing models.[1]

the common-law rules. They may be seen in Rodgers *v.* The State, 26 Ala. 76; Eslava *v.* The State, 44 Ala. 406, 408; Schuster *v.* The State, 48 Ala. 199; Napier *v.* The State, 50 Ala. 168; Ray *v.* The State, 50 Ala. 172; Jacobson *v.* The State, 55 Ala. 151; Mitchell *v.* The State, 55 Ala. 160.

[1] **Unlicensed.** — For keeping a bowling alley, without license, contrary to a city ordinance, The State *v.* Stearns, 11 Fost. N. H. 106. **Dealing the Game.** — People *v.* Saviers, 14 Cal. 29; Brown *v.* The State, 40 Ga. 689. **On Sunday.** — Under the title LORD'S DAY. **Assisting in Cock-fighting.** — Morley *v.* Greenhalgh, 3 B. & S. 374. **Assault** — on account of money won at gaming, Rex *v.* Darley, 4 East, 174. **Proceedings for Forfeiture** — of gaming implements, Commonwealth *v.* Gaming Implements, 119 Mass. 332.

For GAMING-HOUSE, see NUISANCE.
GRAND LARCENY, see LARCENY.
GRAVEYARD, see SEPULTURE.
HARBORING, see ante, § 114, 118, 122.

CHAPTER XL.

HAWKERS AND PEDDLERS.[1]

§ 508. **Diversities and the Consequence.** — The statutes prohibiting unlicensed hawking and peddling, and the proceedings upon them, are in our various States so diverse as to render hopeless any attempt to aid the practitioner by general forms. All that can be profitably done under this head is embodied in the explanations in "Statutory Crimes."

§ 509. **Forms** — may be found at the places referred to in the note.[2]

§ 510. **Practical Method.** — One having occasion to proceed on a statute of this sort will do best to lay it before him, and with it any forms which the reports of his own State contain, as cited in the note to the last section; then let him carefully read the chapter entitled "Hawkers and Peddlers" in "Statutory Crimes." If thereupon he follows the directions given in an early chapter of this volume,[3] he will encounter no difficulties.

[1] For the direct expositions of the offence of unlawful hawking and peddling, with the pleading, practice, and evidence, see Stat. Crimes. § 1071–1088. Incidental, Ib. § 210.

[2] Burn Just. Hawkers and Peddlers; Rex *v.* Little, 1 Bur. 609; Rex *v.* Selway, 2 Chit. 522.

Alabama. — Hirschfelder *v.* The State, 18 Ala. 112; Sterne *v.* The State, 20 Ala. 43; Seymour *v.* The State, 51 Ala. 52.

Arkansas. — The State *v.* McGinnis, 37 Ark. 362.

Indiana. — Alcott *v.* The State, 8 Blackf. 6.

Iowa. — The State *v.* Doe, 50 Iowa, 541.

Massachusetts. — Commonwealth *v.* Ober, 12 Cush. 493; Commonwealth *v.* Bruckheimer, 14 Gray, 29.

South Carolina. — The State *v.* Powell, 10 Rich. 373.

Tennessee. — The State *v.* Moore, Meigs, 476; The State *v.* Sprinkle, 7 Humph. 36.

Wisconsin. — Morrill *v.* The State, 38 Wis. 428.

[3] Ante, § 9–36.

CHAPTER XLI.

HEALTH REGULATIONS.[1]

§ 511. **Elsewhere.** — Most of what might properly be placed under this head is considered under other titles; as, "Noxious and Adulterated Food," "Nuisance," and the like.

§ 512. **Board of Health Order.** — We have the form of an indictment for disobeying the order of a board of health to remove a nuisance detrimental to the public health. But it need not be transferred to these pages; for it will seldom be wanted, and it can be readily consulted in its original place.[2]

§ 513. **Breach of Quarantine.** — An English precedent, which the American practitioner can readily adapt to the particular facts and law of his case, is, —

That on, &c. an order was made by the King in council whereby it was ordered, that, if any pilot or other person should go on board of any ship or vessel obliged to perform quarantine, such pilot or other person should perform quarantine in like manner as any person coming in such ship or vessel should be obliged to perform the same; that the said order was published, &c. and has ever since been in force; that, after such making and publishing of said order, A, &c. on, &c. at, &c. well knowing the premises [but having no regard to the laws and statutes of this realm [3]], [with force and arms [4]] went on board a certain ship called the Stephen, which was then obliged to perform quarantine, in order to conduct the same into the port of Bristol, and did not perform quarantine in like manner as any person coming in the said ship was obliged to perform the same, but did [with force and arms], on, &c. at, &c. unlawfully quit the said ship by going on board a certain other vessel, in a certain place within his Majesty's dominions before the aforesaid ship Stephen had fully performed and been discharged from such quarantine; he the said A not being in any manner or in any case, or by any license, directed or permitted by any order made by his Majesty in council so to do; against the peace, &c.[5]

[1] Crim. Law, I. § 489–494.

[2] Reed *v.* People, 1 Parker C. C. 481.

[3] Not necessary. Ante, § 45.

[4] Unnecessary. Ante, § 43.

[5] 2 Chit. Crim. Law, 551; Rex *v.* Harris, 4 T. R. 202, 2 Leach, 4th ed. 549. As

§ 514. **Not Vaccinating.** — There are statutes in England and generally in our States, making it penal for parents and others having the care of children to neglect or refuse to have them vaccinated. We appear to have no American precedents for the indictment or complaint. By construction of the English enactments, a person who has been once convicted and has paid his fine is not liable to a second prosecution in respect of the same child. The allegations, under complicated provisions which it is not necessary here to recite, may be, —

That A, &c. on, &c. at, &c. being then and there the father of a child called X, born after, &c. to wit, on, &c. unlawfully did not, within three calendar months after the birth of the said child, take or [1] cause to be taken the said child, the same not having been previously vaccinated by some duly qualified medical practitioner, to one of the medical officers duly appointed in that behalf in M aforesaid, for the purpose of being vaccinated, according to the provisions of the statute in such case made and ordained, although one O, the late registrar of births in said M, did, on the registration of the birth of the said child, to wit, on, &c. give due notice in writing to the said A in manner and form directed by the said statute; against the peace, &c.[2]

to the Mississippi statute, see Bloom *v.* The State, 57 Missis. 752.

[1] "Or" is the proper conjunction here, not "and," because the allegation is negative. Ante, § 97, note, 420 and note.

[2] Pilcher *v.* Stafford, 4 B. & S. 775.

For HIGH TREASON, see TREASON.
HIGHWAY, see WAY.

CHAPTER XLII.

HOMICIDE, THE SUBSTANTIVE FELONY OF.[1]

§ 515. **How Chapter divided.** — We shall consider, I. The Indictment under the Common-law Rules, both for the Common-law and for the Statutory Offence; II. The Indictment as modified by Statutes; III. Practical Suggestions.

I. *The Indictment under the Common-law Rules.*

§ 516. **Degrees.** — There are, at the common law, two degrees of felonious homicide; and, under statutes prevailing in considerable numbers of our States, there is an additional degree, making in all three degrees. Only these three need be mentioned here, though in two or three exceptional States there are still other degrees. Speaking in general terms and without referring to possible statutory exceptions, these three degrees consist of what in olden times was simply felonious homicide, or manslaughter, — a purely common-law offence. A statute, now woven into the common law and become parcel of it, elevated to "murder" such of these felonious killings as proceeded from

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 613–738; Crim. Proced. II. § 495–642; Stat. Crimes, § 465–477. Incidental, Crim. Law, I. § 112–116, 131–134, 143, 217, 227, 259, 305, 314, 321, 328, 332, 334, 346–349, 358, 361, 364, 371, 401, 409, 410, 414, 415, 429, 510, 547, 557, 558, 562–564, 600, 615, 635, 637, 639, 640, note, 652, 654, 666, 676, 678, 693, 698, 736, 780, 781, 788, 792, 795, 797, 808, 811, 843–877, 883, 968, 988, 1004, 1005, 1053, 1056, 1058, 1059, 1061; II. § 56, 311; Crim. Proced. I. § 50–53, 102, 104–106, 108, 159, 162, 374, 392, 470, 542, 548, 553, 914, 959 *d*, 966 *c*, 1006, 1007, 1010, 1056, 1086, 1098, 1124, 1207–1216; II. § 302, 747; Stat. Crimes, § 184, note, 185, 242, 260 *a*, 742, 743, 747, 759. And see DUELLING — NEGLECTS — SELF MURDER.

"malice aforethought;" the statutory expression being "wilful murder of malice prepensed."[1] Thus we have the two common-law degrees of manslaughter and murder. The statutory degree, called murder in the first degree, was made out of murder, and the part of it oftenest brought into notice was created in the same way as murder had been produced from manslaughter. It consists of those murders wherein the malice aforethought is "deliberately premeditated," or something else of the sort; the statutory expression in this particular differing in our respective States.[2] Now, —

§ 517. **Indictment.** — The reader perceives that the killing is the same in these several forms of felonious homicide; the difference consisting in the different states of mind, or intents, or contemplated objects, which impelled the slayer to do what resulted in death. Thus, —

Manslaughter — is simply where one kills another "feloniously."

Murder — is where one kills another "feloniously" and of "*malice aforethought.*"

Murder in the First Degree — is where one kills another "feloniously" and of such "*malice aforethought*" as is "DELIBERATELY PREMEDITATED," or whatever else the statutory expression may be. So that —

Distinction in Indictment. — The main part of the indictment for all three forms of killing is the same. For manslaughter, the killing must be alleged to have been done "feloniously." For murder (or murder in the second degree), it must be charged to have been done "feloniously and of *malice aforethought;*" and the word "*murder*" must also be woven in some way into the allegations, so as fully to cover the phrase in the old statute. For murder in the first degree the statutory expression "DELIBERATELY PREMEDITATED," or whatever else it is, must be added; resulting, for example, in the phrase "feloniously and of DELIBERATELY PREMEDITATED *malice aforethought.*" Taking, from this averment, the words here printed in small capitals, what remains is an indictment for common-law murder, or the statutory murder in the second degree; taking from it also the words here printed in italics, and the word "*murder,*" an indictment for manslaughter remains.[3] Hence, —

[1] Crim. Law, II. § 624–628.
[2] Crim. Law, II. § 723–730.
[3] Crim. Proced. II. § 540–550, 561–564.

§ 518. **How in this Chapter — (Degrees distinguished).** — We shall not, in this chapter, to any great extent have separate indictments for manslaughter, for murder, and for murder in the first degree. But those special allegations which are essential to murder in the first degree will be printed in SMALL CAPITALS, and those required in murder, or murder in the second degree, will be set here in *italics;* so that, when the words in small capitals are stricken out, what remains will be an indictment for common-law murder, or murder in the statutory second degree, and when both the small capitals and the italics are struck out the residue will be an indictment for manslaughter.

§ 519. **Elsewhere.** — There are in "Criminal Procedure" some forms[1] which, and especially the explanations attending which, the reader will do well to consult in connection with this chapter. Indeed, all the elucidations of this subject in that work ought to be carefully studied by the inexperienced pleader, before he draws an indictment for any sort of felonious homicide.

§ 520. **Formula — (Forms).** — In consequence of the exact instructions which the nature of this subject rendered possible in "Criminal Procedure," and in consequence of the uniform plan on which under the common-law rules the indictment for felonious homicide has always been drawn, the formula for it, embracing its various degrees, may be more minutely constructed than in the natures of the several other subjects could be the formulas under most of the other titles. The consequence of which is, that the present formula will serve also as a compact series of forms, more available to the practitioner than would be many pages of the ordinary precedents. Thus, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did feloniously, [wilfully[2]], *and of his* DELIBERATELY PREMEDITATED [*or*, &c. as to the matter in these small capitals, employing the words, whatever they may be, of the statute creating murder in the first degree] *malice aforethought*,[3] make an assault[4] on one X [ante, § 79; Crim. Proced. II. § 506–511],

[1] Crim. Proced. II. § 502, 541, 564.

[2] It is common, in the indictment both for murder and for manslaughter, to insert here the word "wilfully." But it is not necessary in either. Crim Proced. II. § 502, 543, 545; post, § 542, note.

[3] For the significance of these SMALL CAPITALS and *italics* see ante, § 517, 518.

[4] **Charging Assault.** — Assault is an element in most felonious homicides, not necessarily in all. When it is such element, it should be averred; when not, it need not be, though if the useless allegation is inserted it will do no harm. But the word "assault" is not indispensable in the allegation of it; yet it is common in all these indictments, whether required or not. Crim. Proced. II. § 512, 513, 537, 538, 553, 554; ante, § 207–209.

and [proceeding now to state what is special to the particular case; as, when it is **With Fire-arms**], — a certain gun, which then and there was loaded with gunpowder and one leaden bullet,[1] and by him the said A had and held in both his hands,[2] he the said A did then and there feloniously and of his DELIBERATELY PREMEDITATED [*or*, &c. as above] *malice aforethought*[3] shoot off and discharge at and upon the said X, thereby, and by thus striking the said X with the said leaden bullet, inflicting on and in the left side of his head one mortal wound[4] [*or*, **By Stabbing**, — with a certain knife (*or* sword, *or* dagger, *or* sharp instrument to the jurors unknown), which he the said A then and there had and held in his right hand, did then and there feloniously and of his DELIBERATELY PREMEDITATED (*or*, &c. as above) *malice aforethought* strike, stab, thrust, and cut at, upon, and into the said X, inflicting on the said X, in the abdomen of the said X, one mortal wound;[5] or, **By Cutting the Throat**, — with a certain knife which

[1] While something of this sort of particularity is required in averment, the proofs need not be exact in point of form. For example, the allegation in the text would doubtless be satisfied by showing that the gun was charged with compressed air and dynamite. Certainly it would be no fatal variance should it appear that the bullet was of iron. Crim. Proced. II. § 514.

[2] Probably this averment is more minute than is necessary, but it may be safer so. Crim. Proced. II. § 515. In Commonwealth *v.* Costley, 118 Mass. 1, 21, it was adjudged permissible to omit the entire allegation that the weapon was held by the defendant.

[3] This repetition of "feloniously," &c. is nearly universal in the precedents, but it would appear to be unnecessary; the former "feloniously," &c. extending to and qualifying this clause also. Still I should prefer to continue its use. Crim. Proced. II. § 547.

[4] I have endeavored to avoid some of the common verbiage of this allegation, yet to omit nothing which any pleader would deem important. Consult, for further forms for it, Crim. Proced. II. § 564; 3 Chit. Crim. Law, 752–756, 781; Rex *v.* Morley, Trem. P. C. 280; Rex *v.* Kinch, 28 Howell St. Tr. 619; Reg. *v.* Downing, 2 Car. & K. 382; Shropshire *v.* The State, 7 Eng. 190, 192; Dixon *v.* The State, 29 Ark. 165, 167; Haney *v.* The State, 34 Ark. 263; Studstill *v.* The State, 7 Ga. 2; Reed *v.* The State, 8 Ind. 200; Dukes *v.* The State, 11 Ind. 557; Shepherd *v.* The State, 64 Ind. 43; The State *v.* Stanley, 33 Iowa, 526; Commonwealth *v.* Costley, 118 Mass. 1; Pfomer *v.* People, 4 Parker C. C. 558; Fitzgerald *v.* People, 37 N. Y. 413; The State *v.* Dodson, 4 Oregon, 64; Carter *v.* The State, 5 Texas Ap. 458; United States *v.* Guiteau, Official Record of the case, 1. The following, from 3 Chit. Crim. Law, 753, shows, more nearly than the text, the form as commonly employed where there have been no statutory modifications of the common-law rules. It is objectionable simply because of its needless words: —

"And that the said A a certain pistol of the value of two shillings, then and there being charged with gunpowder and a leaden bullet, which pistol he the said A in his right hand then and there had and held, against, at, and upon him the said X then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off; and that the said A, with the leaden bullet aforesaid, by force of the gunpowder aforesaid, out of the said pistol by him the said A so as aforesaid discharged and shot off, him the said X in and upon the left side of the said X, a little under the lowest rib of the said X, then and there feloniously, wilfully, and of his malice aforethought did strike and wound, giving to the said X then and there with the leaden bullet aforesaid, out of the said pistol so as aforesaid discharged and shot off, in and upon the said left side, a little under the lowest rib of the said X, one mortal wound of the breadth of one inch and depth of four inches."

[5] It is common to put this averment also into a greater number of words; for

he the said A then and there held in his right hand, the throat of the said X then and there feloniously and of his DELIBERATELY PREMEDITATED (*or*, &c. as above) *malice aforethought* did strike and cut, giving to the said X in his throat aforesaid one mortal wound;[1] *or*, **By Beating**, — with a certain iron poker (*or* axe, *or* dangerous weapon, to wit, a certain wooden club of the length of four feet and thickness of two inches, *or* spade) which he the said A then and there had and held in his right hand (*or*, both his hands), did then and there feloniously and of his DELIBERATELY PREMEDITATED (*or*, &c. as above) *malice aforethought* strike and beat the said X, giving to him the said X, in and upon the top of the head of him the said X, one mortal contusion, bruise, fracture, and wound;[2] *or*, **By Choking and Strangling**, — with a certain rope (*or* cord, *or* handkerchief) by him the said A then and there with both his hands placed and tightly drawn around and upon the neck of the said X (*or*, with both the hands of him the said A placed and tightly pressed around and upon the neck of the said X), he the said A did then and there feloniously and of his DELIBERATELY PREMEDITATED (*or*, &c. as above) *malice aforethought*, give to the said X, upon and around the neck of the said X, a mortal[3] pressure, choking, and

which, and for various modifications of the expression, see Crim. Proced. II. § 541; 3 Chit. Crim. Law, 756–758, 782; Rex *v.* Thurston, Trem. P. C. 7; Rex *v.* Knowles, Trem. P. C. 11; Rex *v.* Doughty, Trem. P. C. 285; Rex *v.* Chetwynd, 18 Howell St. Tr. 290; The State *v.* Moran, 7 Iowa, 236; The State *v.* Bowen, 16 Kan. 475, 476; The State *v.* Wood, 53 N. H. 484; People *v.* Ruloff, 3 Parker C. C. 401, 408; Shay *v.* People, 4 Parker C. C. 353; Keefe *v.* People, 40 N. Y. 348.

[1] Parker's Case, 2 Dy. 186 *a*; 3 Chit. Crim. Law, 757.

[2] The pleader should be careful not to employ the word "wound" alone here, unless the injury was, in legal language, a "wound;" for the meaning of which word see Stat. Crimes, § 314. For various forms of this allegation, see 3 Chit. Crim. Law, 758–765; Rex *v.* Quirk, 4 Went. Pl. 46; Rex *v.* Biggleston, Trem. P. C. 10; Bruner *v.* The State, 58 Ind. 159; The State *v.* Conley, 39 Maine, 78; Turns *v.* Commonwealth, 6 Met. 224; Commonwealth *v.* McAfee, 108 Mass. 458; People *v.* Johnson, 2 Wheeler Crim. Cas. 361; Sanchez *v.* People, 22 N. Y. 147; Rufer *v.* The State, 25 Ohio State, 464. The forms of this class are numerous and they vary with the facts. All are in more words than necessary. A suggestive one of Chitty's, 3 Chit. Crim. Law, 761, is, —

"And that the said A then and there feloniously, wilfully, and of his malice aforethought did strike, beat, and kick the said X, with his hands and feet, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said X, and did then and there feloniously, wilfully, and of his malice aforethought cast and throw the said X down, unto, and upon the ground with great force and violence there, giving unto the said X then and there, as well by the beating, striking, and kicking of him the said X, in manner and form aforesaid, as by the casting and throwing of him the said X down as aforesaid, several mortal strokes, wounds, and bruises, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said X, to wit, one mortal wound on the left side of the belly of him the said X, of the length of five inches and of the depth of six inches, &c. [adding the rest]."

[3] **Mortal.** — The general rule is distinct, and fully established by authority, that the wound or other injury must, in felonious homicide, be alleged to have been "mortal." Crim. Proced. II. § 521, 553; The State *v.* Morgan, 85 N. C. 581. And so, in general, are the precedents. But in these for choking and strangling, and in those for suffocation, the fact is otherwise. I am not aware that the question of the necessity of this averment, in this particular class of cases, has been raised; but I have examined, with reference to it, large num-

strangling of him the said X;[1] *or*, **By Unknown Means**, — in some way and manner, and by some means, instruments, and weapons to the jurors unknown, he the said A did then and there feloniously and of his DELIBERATELY PREMEDITATED (*or*, &c. as above) *malice aforethought* inflict on and create in said X certain mortal injuries and a mortal sickness a further description whereof is to the jurors unknown [2]; of which said mortal wound [*or* mortal contusion, bruise, fracture, and wound, *or* mortal pressure, choking, and strangling, *or* mortal injuries and sickness to the jurors unknown] the said X then and there [instantly [3]] died [*or*, thence continually languished until, on, &c. he there died [4]]. And so the said A did, in manner and form aforesaid, feloniously and of his DELIBERATELY PREMEDITATED [*or*, &c. as above] *malice aforethought*, kill and *murder* the said X; against the peace, &c. [ante, § 66–69].[5]

bers of the precedents before me, and I have not found one in which even the word "mortal" is used. Still, for the sake of caution, I have so shaped the form in the text as to obviate the objection. I see no reason in principle why the word "mortal" is not as essential in this case as in one of throat-cutting. But the whole structure of the indictment for felonious homicide is so technical that it is not safe to reason much about it from principle. The following, from 3 Chit. Crim. Law, 766, may be deemed an average averment for choking: —

"And that the said A a certain cord of the value of sixpence, about the neck of the said X then and there feloniously, voluntarily, and of his malice aforethought did put and fasten, and that the said A, with the cord aforesaid by him so about the neck of the said X put and fastened, then and there him the said X feloniously, voluntarily, and of his malice aforethought did choke and strangle, of which, &c. [proceeding to allege the death]."

[1] For other forms, see 3 Chit. Crim. Law, 765–768, 778; Rex *v.* Taylor, 4 Went. 45; Rex *v.* Green, Trem. P. C. 6; Rex *v.* Atkins, 7 Howell St. Tr. 231; Rex *v.* Cowper, 13 Howell St. Tr. 1106; Rex *v.* Goodere, 17 Howell St. Tr. 1003; Rex *v.* White, 17 Howell St. Tr. 1079; Rex *v.* Huggins, 3 Car. & P. 414; Rex *v.* Culkin, 5 Car. & P. 121; Rex *v.* Tye, Russ. & Ry. 345; The State *v.* Jeffreys, 3 Murph. 480; Moore *v.* The State, 2 Ohio State, 500; Wallace *v.* The State, 10 Texas Ap. 255.

Bastard Child — (Smothering). — Most of the above forms are for the murder of a bastard child at or near the time of its birth. And in this class of cases it is common, but not universal, to introduce a mass of surplus averments; such as that, at the time and place in question, the defendant was big with a child which in the providence of God was born alive, and which was a bastard. Upon this child, saying nothing of the name, the assault is then alleged to have been made, and then the killing. In one of Chitty's precedents, — 3 Chit. Crim. Law, 767, — there is an averment for smothering in such a case, as follows: —

"And the said A, with both her hands, the said female bastard child in a certain linen cloth of the value of twopence feloniously, wilfully, and of her malice aforethought did put, place, fold, and wrap up, by means of which said putting, placing, folding, and wrapping up of the said female bastard child, in the said linen cloth, by her the said A as aforesaid, the said female bastard child was then and there choked, suffocated, and smothered; of which," &c.

[2] Commonwealth *v.* Webster, 5 Cush. 295; The State *v.* Williams, 7 Jones, N. C. 446; Edmonds *v.* The State, 34 Ark. 720.

[3] Common, but plainly not necessary, and it would seem to be better omitted. Crim. Proced. II. § 532. It is not in all the precedents; for example, not in Commonwealth *v.* Webster, supra.

[4] Or, what is more common, but less neat and brief, "of which mortal wound, &c. the said X," &c. as in the form in Crim. Proced. II. § 532 or 541.

[5] For precedents see Crim. Proced. II. § 502, 541, 564; 3 Chit. Crim. Law, 750–784; 4 Went. Pl. 45-50; 2 Cox C. C.

§ 521. **Other like Forms.** — This series of forms will not only satisfy the wants of the pleader in the great majority of his cases,

App. 4; 3 Ib. App. 57, 75; Rex *v.* Green, Trem. P. C. 6, 7 Howell St. Tr. 159; Rex *v.* Thurston, Trem. P. C. 7; Rex *v.* Biggleston, Trem. P. C. 10; Rex *v.* Knowles, Trem. P. C. 11; Rex *v.* Morley, Trem. P. C. 280; Rex *v.* Doughty, Trem. P. C. 285; Rex *v.* Sanquire, 2 Howell St. Tr. 743; Rex *v.* Weston, 2 Howell St. Tr. 911; Rex *v.* Atkins, 7 Howell St. Tr. 231; Rex *v.* Coningsmark, 9 Howell St. Tr. 1, 3; Rex *v.* Harrison, 12 Howell St. Tr. 834; Rex *v.* Mohun, 12 Howell St. Tr. 950, 956; Rex *v.* Knowles, 12 Howell St. Tr. 1167; Rex *v.* Cowper, 13 Howell St. Tr. 1106; Rex *v.* Kidd, 14 Howell St. Tr. 123, 130; Rex *v.* Reason, 16 Howell St. Tr. 1; Rex *v.* Onehy, 17 Howell St. Tr. 30; Rex *v.* Goodere, 17 Howell St. Tr. 1003; Rex *v.* White, 17 Howell St. Tr. 1079; Rex *v.* Annesley, 17 Howell St. Tr. 1094; Rex *v.* Chetwynd, 18 Howell St. Tr. 290; Rex *v.* Jackson, 18 Howell St. Tr. 1070, 1074; Rex *v.* Blandy, 18 Howell St. Tr. 1118; Rex *v.* Jefferys, 18 Howell St. Tr. 1193; Rex *v.* Barbot, 18 Howell St. Tr. 1230; Rex *v.* Stevenson, 19 Howell St. Tr. 846; Rex *v.* Ferrers, 19 Howell St. Tr. 886, 891; Rex *v.* Byron, 19 Howell St. Tr. 1177, 1180; Rex *v.* Kinch, 28 Howell St. Tr. 619; Reg. *v.* Saunders, 2 Plow. 473; Parker's Case, 2 Dy. 186 *a*; Yong's Case, 4 Co. 40 *a*; Rex *v.* Heydon, 4 Co. 41 *a*; Vaux's Case, 4 Co. 44 *a*; Long's Case, 5 Co. 120 *a*; Mackalley's Case, 9 Co. 61 *b*; Rex *v.* Clark, 1 Brod. & B. 473; Reg. *v.* Ingham, 5 B. & S. 257; Reg. *v.* Richards, 2 Q. B. D. 311, 13 Cox C. C. 611; Rex *v.* Taylor, 1 Leach, 4th ed. 360; Rex *v.* Coombes, 1 Leach, 4th ed. 388; Rex *v.* Radbourne, 1 Leach, 4th ed. 457; Rex *v.* Gordon, 1 Leach, 4th ed. 515; Rex *v.* Hindmarsh, 2 Leach, 4th ed. 569; Rex *v.* Depardo, Russ. & Ry. 134; Rex *v.* Dyson, Russ. & Ry. 523; Rex *v.* Tye, Russ. & Ry. 345; Rex *v.* Dale, 1 Moody, 5; Rex *v.* Mosley, 1 Moody, 98, 1 Lewin, 189; Reg. *v.* Michael, 2 Moody, 120, 9 Car. & P. 356; Reg. *v.* Sandys, 2 Moody, 227, Car. & M. 345; Reg. *v.* O'Brian, 1 Den. C. C. 9, 2 Car. & K. 115, 1 Cox C. C. 126; Reg. *v.* Warman, 1 Den. C. C. 183, 2 Car. & K. 195; Reg. *v.* Stokes, 1 Den. C. C. 307, 2 Car. & K. 536, 2 Cox C. C. 498; Reg. *v.* Waters, 1 Den. C. C. 356, 2 Car. & K. 864, 3 Cox C. C. 300; Reg. *v.* Manning, 1 Den. C. C. 467, 480; Reg. *v.* Bird, 2 Den. C. C. 94, 224, 5 Cox C. C. 1; Rex *v.* Ridley, 2 Camp. 650; Rex *v.* Webb, 1 Moody & R. 405; Reg. *v.* Spilling, 2 Moody & R. 107; Rex *v.* Huggins, 3 Car. & P. 414; Rex *v.* Long, 4 Car. & P. 423; Rex *v.* Culkin, 5 Car. & P. 121; Rex *v.* Spiller, 5 Car. & P. 333; Rex *v.* Greenacre, 8 Car. & P. 35; Reg. *v.* Marriott, 8 Car. & P. 425; Reg. *v.* Edwards, 8 Car. & P. 611; Reg. *v.* Devett, 8 Car. & P. 639; Reg. *v.* Taylor, 9 Car. & P. 672; Reg. *v.* Packard, Car. & M. 236; Reg. *v.* Crumpton, Car. & M. 597; Reg. *v.* Jones, 1 Car. & K. 243; Reg. *v.* Plummer, 1 Car. & K. 600; Reg. *v.* Serva, 2 Car. & K. 53, 1 Cox C. C. 292; Reg. *v.* Sawyer, 2 Car. & K. 101; Reg. *v.* Barrett, 2 Car. & K. 343; Reg. *v.* Haines, 2 Car. & K. 368, note; Reg. *v.* Downing, 2 Car. & K. 382; Reg. *v.* Ellis, 2 Car. & K. 470; Reg. *v.* West, 2 Car. & K. 784, 2 Cox C. C. 500; Reg. *v.* Bernard, 1 Fost. & F. 240, 243; Turner's Case, 1 Lewin, 177; Ferguson's Case, 1 Lewin, 181; Webb's Case, 2 Lewin, 196; Errington's Case, 2 Lewin, 217; Stockdale's Case, 2 Lewin, 220; Reg. *v.* Pinhorn, 1 Cox C. C. 70; Reg. *v.* Williamson, 1 Cox C. C. 97; Reg. *v.* Pym, 1 Cox C. C. 339; Reg. *v.* Spence, 1 Cox C. C. 352; O'Brien *v.* Reg. 2 Cox C. C. 122; Reg. *v.* Pargeter, 3 Cox C. C. 191; Reg. *v.* Dowling, 3 Cox C. C. 509; Reg. *v.* Bubb, 4 Cox C. C. 455; Reg. *v.* Whitehouse, 5 Cox C. C. 144; O'Neill *v.* Reg. 6 Cox C. C. 495, 496; Reg. *v.* Keyn, 13 Cox C. C. 403, 404; Rex *v.* Foy, Vern. & S. 540; Reg. *v.* Kelly, Jebb, 299; Reg. *v.* Breden, 16 U. C. Q. B. 487; Reg. *v.* Greenwood, 23 U. C. Q. B. 255; Whelan *v.* Reg. 28 U. C. Q. B. 2, 7.

Alabama. — The State *v.* Coleman, 5 Port. 32; Noles *v.* The State, 24 Ala. 672, 688; Henry *v.* The State, 33 Ala. 389; Nelson *v.* The State, 39 Ala. 667; Beasley *v.* The State, 50 Ala. 149; Ezell *v.* The State, 54 Ala. 165, 166; Young *v.* The State, 58 Ala. 379; Green *v.* The State, 66 Ala. 40.

Arkansas. — Shropshire *v.* The State, 7 Eng. 190, 192; Thompson *v.* The State,

but serve as models after which to construct others. Still, for his convenience, the part charging the particular manner of

26 Ark. 323, 325; Dixon *v.* The State, 29 Ark. 165, 167; Haney *v.* The State, 34 Ark. 263; Howard *v.* The State, 34 Ark. 433, 435; Casey *v.* The State, 37 Ark. 67, 68.

California. — People *v.* Wallace, 9 Cal. 30; People *v.* Cox, 9 Cal, 32; People *v.* Steventon, 9 Cal. 273; People *v.* Dolan, 9 Cal. 576; People *v.* Rodriguez, 10 Cal. 50; People *v.* Judd, 10 Cal. 313; People *v.* Coleman, 10 Cal. 334; People *v.* King, 27 Cal. 507; People *v.* Cronin, 34 Cal. 191; People *v.* Murphy, 39 Cal. 52; People *v.* Sandford, 43 Cal. 29, 31; People *v.* Weaver, 47 Cal. 106; People *v.* Graniee, 50 Cal. 447; People *v.* Alviso, 55 Cal. 230.

Florida. — Burroughs *v.* The State, 17 Fla. 643.

Georgia. — Studstill *v.* The State, 7 Ga. 2; Camp *v.* The State, 25 Ga. 689; Bostock *v.* The State, 61 Ga. 635; Coxwell *v.* The State, 66 Ga. 309.

Idaho. — People *v.* Walters, 1 Idaho Ter. N. S. 271, 273; People *v.* Walter, 1 Idaho Ter. N. S. 386.

Illinois. — Fairlee *v.* People, 11 Ill. 1; Beasley *v.* People, 89 Ill. 571, 573.

Indiana. — Reed *v.* The State, 8 Ind. 200; Dillon *v.* The State, 9 Ind. 408; Dukes *v.* The State, 11 Ind. 557; Cordell *v.* The State, 22 Ind. 1; Flinn *v.* The State, 24 Ind. 286; Jones *v.* The State, 35 Ind. 122; Willey *v.* The State, 46 Ind. 363; Manly *v.* The State, 52 Ind. 215; Laydon *v.* The State, 52 Ind. 459; Bechtelheimer *v.* The State, 54 Ind. 128; Meiers *v.* The State, 56 Ind. 336, 339; Veatch *v.* The State, 56 Ind. 584; Bruner *v.* The State, 58 Ind. 159; Snyder *v.* The State, 59 Ind. 105; Greenley *v.* The State, 60 Ind. 141; Kennedy *v.* The State, 62 Ind. 136; Shepherd *v.* The State, 64 Ind. 43; Adams *v.* The State, 65 Ind. 565; Powers *v.* The State, 80 Ind. 77.

Iowa. — The State *v.* Moran, 7 Iowa, 236; The State *v.* Shelledy, 8 Iowa, 477; The State *v.* Neeley, 20 Iowa, 108; The State *v.* O'Niel, 23 Iowa, 272; The State *v.* McCormick, 27 Iowa, 402; The State *v.* Watkins, 27 Iowa, 415; The State *v.* Knouse, 29 Iowa, 118; The State *v.* Stanley, 33 Iowa, 526; The State *v.* Zeibart, 40 Iowa, 169, 170; The State *v.* Davis, 41 Iowa, 311.

Kansas. — Horne *v.* The State, 1 Kan. 42; Smith *v.* The State, 1 Kan. 365; The State *v.* Bowen, 16 Kan. 475, 476; The State *v.* Winner, 17 Kan. 298.

Kentucky. — Jane *v.* Commonwealth, 3 Met. Ky. 18; White *v.* Commonwealth, 9 Bush, 178; Conner *v.* Commonwealth, 13 Bush, 714, 716.

Maine. — The State *v.* Conley, 39 Maine, 78; The State *v.* Knight, 43 Maine, 11; The State *v.* Verrill, 54 Maine, 408; The State *v.* Cleveland, 58 Maine, 564; The State *v.* Grand Trunk Railway, 60 Maine, 145, The State *v.* Maine Central Railroad, 60 Maine, 490; The State *v.* Smith, 65 Maine, 257; The State *v.* Smith, 67 Maine, 328; The State *v.* Morrissey, 70 Maine, 401; The State *v.* Littlefield, 70 Maine, 452.

Maryland. — Davis *v.* The State, 39 Md. 355.

Massachusetts. — Turns *v.* Commonwealth, 6 Met. 224; Commonwealth *v.* Webster, 5 Cush. 295; Commonwealth *v.* Chapman, 11 Cush. 422; Commonwealth *v.* Boston and Worcester Railroad, 11 Cush. 512; Commonwealth *v.* Barker, 12 Cush. 186; Commonwealth *v.* Stafford, 12 Cush. 619; Commonwealth *v.* Desmarteau, 16 Gray, 1; Commonwealth *v.* Hersey, 2 Allen, 173; Green *v.* Commonwealth, 12 Allen, 155; Commonwealth *v.* Macloon, 101 Mass. 1; Commonwealth *v.* Roberts, 108 Mass. 296; Commonwealth *v.* McAfee, 108 Mass. 458; Commonwealth *v.* Costley, 118 Mass. 1; Commonwealth *v.* Fitchburg Railroad, 120 Mass. 372; Commonwealth *v.* Hartwell, 128 Mass. 415; Commonwealth *v.* Chiovaro, 129 Mass. 489; Commonwealth *v.* Coburn, 132 Mass. 555.

Michigan. — Washburn *v.* People, 10 Mich. 372; Evans *v.* People, 12 Mich. 27; Sneed *v.* People, 38 Mich. 248; Cargen *v.* People, 39 Mich. 549; Chapman *v.* People, 39 Mich. 357; In re Peoples, 47 Mich. 626, 630.

Minnesota. — The State *v.* Ryan, 13 Minn. 370; The State *v.* McIntyre, 19 Minn. 93.

Mississippi. — Neeomh *v.* The State, 37

inflicting the mortal injury in some other classes of cases will be added. And the general allegations of the last section will supply the rest. Thus, —

Missis. 383; Nichols *v.* The State, 46 Missis. 284, 288.

Missouri. — Rice *v.* The State, 8 Misso. 561; Josephine *v.* The State, 39 Misso. 613; The State *v.* Reakey, 62 Misso. 40, 1 Misso. Ap. 3; The State *v.* Sides, 64 Misso. 383, 385; The State *v.* Edmundson, 64 Misso. 398; The State *v.* Steeley, 65 Misso. 218; The State *v.* Blan, 69 Misso. 317; The State *v.* Edwards, 70 Misso. 480; The State *v.* Hopper, 71 Misso. 425, 427.

Montana. — Territory *v.* Stears, 2 Mon. Ter. 324.

Nevada. — The State *v.* Millain, 3 Nev. 409, 435, 437; The State *v.* Chamberlain, 6 Nev. 257; The State *v.* Harkin, 7 Nev. 377; The State *v.* Pierce, 8 Nev. 291; The State *v.* Huff, 11 Nev. 17, 19; The State *v.* Raymond, 11 Nev. 98, 100; The State *v.* Larkin, 11 Nev. 314, 316; The State *v.* Huff, 12 Nev. 140, 143; The State *v.* Crozier, 12 Nev. 300; The State *v.* Harris, 12 Nev. 414, 417; The State *v.* McLane, 15 Nev. 345, 352; The State *v.* Hing, 16 Nev. 307.

New Hampshire. — The State *v.* Pike, 49 N. H. 399; The State *v.* Manchester, &c. Railroad, 52 N. H. 528; The State *v.* Wood, 53 N. H. 484.

New Mexico. — Tenorio *v.* Territory, 1 New Mex. 279.

New York. — People *v.* Johnson, 2 Wheeler Crim. Cas. 361; Lake *v.* People, 1 Parker C. C. 496, 497; People *v.* Thurston, 2 Parker C. C. 49, 52; People *v.* Robinson, 2 Parker C. C. 235; People *v.* Butler, 3 Parker C. C. 377; People *v.* Rulloff, 3 Parker C. C. 401; Hunt *v.* People, 3 Parker C. C. 569; People *v.* Hartung, 4 Parker C. C. 256; Shay *v.* People, 4 Parker C. C. 353; Stephens *v.* People, 4 Parker C. C. 396, 399; Pfomer *v.* People, 4 Parker C. C. 558; Cohel *v.* People, 5 Parker C. C. 348; Lowenberg *v.* People, 5 Parker C. C. 414, 417; People *v.* Holmes, 6 Parker C. C. 25; Fitzgerald *v.* People, 49 Barb. 122, 4 Abb. Pr. N. S. 68, 37 N. Y. 413; Reynolds *v.* People, 17 Abb. Pr. 413; People *v.* Enoch, 13 Wend. 159; People *v.* White, 22 Wend. 167, 24 Wend. 520; People *v.* Jackson, 3 Hill, N. Y. 92; Sanchez *v.* People, 22 N. Y. 147; Kennedy *v.* People, 39 N. Y. 245; Keefe *v.* People, 40 N. Y. 348.

North Carolina. — The State *v.* Adams, Mart. N. C. 30; The State *v.* Carter, Conference, 210; The State *v.* Cherry, 3 Murph. 7; The State *v.* Jeffreys, 3 Murph. 480; The State *v.* Orrell, 1 Dev. 139; The State *v.* Kimbrough, 2 Dev. 431; The State *v.* Moses, 2 Dev. 452; The State *v.* Cæsar, 9 Ire. 391; The State *v.* Tilghman, 11 Ire. 513; The State *v.* Williams, 7 Jones, N. C. 446; The State *v.* Morgan, 85 N. C. 581; The State *v.* Davis, 87 N. C. 514.

Ohio. — Sutcliffe *v.* The State, 18 Ohio, 469; Moore *v.* The State, 2 Ohio State, 500; Robbins *v.* The State, 8 Ohio State, 131; Kain *v.* The State, 8 Ohio State, 306; Loeffner *v.* The State, 10 Ohio State, 598; Blackburn *v.* The State, 23 Ohio State, 146; Warden *v.* The State, 24 Ohio State, 143; Rufer *v.* The State, 25 Ohio State, 464; Williams *v.* The State, 35 Ohio State, 175; Price *v.* The State, 35 Ohio State, 601.

Oregon. — The State *v.* Dodson, 4 Oregon, 64; The State *v.* Brown, 7 Oregon, 186, 196.

Pennsylvania. — Respublica *v.* Honeyman, 2 Dall. 228; White *v.* Commonwealth, 6 Binn. 179; Commonwealth *v.* Earle, 1 Whart. 525; Johnson *v.* Commonwealth, 12 Harris, Pa. 386; Lutz *v.* Commonwealth, 5 Casey, Pa. 441; Campbell *v.* Commonwealth, 3 Norris, Pa. 187; Turner *v.* Commonwealth, 5 Norris, Pa. 54; Brandt *v.* Commonwealth, 13 Norris, Pa. 290.

South Carolina. — The State *v.* Raines, 3 McCord, 533; The State *v.* Rabon, 4 Rich. 260; The State *v.* Huggins, 12 Rich. 402.

Tennessee. — Mitchell *v.* The State, 8 Yerg. 514; Womack *v.* The State, 7 Coldw. 508; Williams *v.* The State, 3 Heisk. 37; Anderson *v.* The State, 3 Heisk. 86, 94; The State *v.* Ayers, 8 Baxter, 96; Foster *v.* The State, 6 Lea, 213; Kannon *v.* The State, 10 Lea, 386.

Texas. — Wilson *v.* The State, 29 Texas,

§ 522. **Riding over One with a Horse.** — "And that," to copy Chitty's exact words, "the said A, then and there riding upon a certain horse [of the price of twenty pounds [1]], the said horse in and upon the said X then and there feloniously, wilfully, and of his [DELIBERATELY PREMEDITATED [2]] *malice aforethought* did ride and force, and him the said X, with the horse aforesaid, then and there by such riding and forcing did throw to the ground; by means whereof the said horse with his hinder feet him the said X so thrown to and upon the ground as aforesaid, in and upon the hinder part of the head of him the said X, did then and there strike and kick, thereby then and there giving to him the said X, in and upon the said hinder part of the head of him the said X, one mortal fracture and contusion." [3]

§ 523. **By Drowning.** — "And that the said A," to copy again from Chitty, "then and there feloniously, wilfully, and of her [DELIBERATELY PREMEDITATED] *malice aforethought*, did take the said X into both the hands of her the said A, and did then and there feloniously, wilfully, and of her [DELIBERATELY PREMEDITATED] *malice aforethought.* cast, throw, and push the said X into a certain pond there [situate [4]], wherein there then was a great quantity of water, by means of which casting, throwing, and pushing of the said X into the pond aforesaid by the said A in form aforesaid, she the said X in the pond aforesaid, with the water aforesaid, was then and there [mortally [5]] choked, suffocated, and drowned." [6]

§ 524. **By Burning.** — And divers large quantities of straw, which he the said A in both his hands then and there had and held, did, upon the breast and belly, and near to and about the head and neck, of the said X then and there feloniously and of his DELIBERATELY PREMEDITATED [*or*, &c.

240; Thompson *v.* The State, 36 Texas, 326; The State *v.* Rupe, 41 Texas, 33; Edmondson *v.* The State, 41 Texas, 496; Williams *v.* The State, 42 Texas, 392; The State *v.* Edmondson, 43 Texas, 162; Nelson *v.* The State, 1 Texas Ap. 41; Marshall *v.* The State, 5 Texas Ap. 273, 274; Carter *v.* The State, 5 Texas Ap. 458; Jennings *v.* The State, 7 Texas Ap. 350; Wallace *v.* The State, 10 Texas Ap. 255; Dwyer *v.* The State, 12 Texas Ap. 535, 539.

Virginia. — Maile *v.* Commonwealth, 9 Leigh, 661; Hawley *v.* Commonwealth, 75 Va. 847.

West Virginia. — The State *v.* Abbott, 8 W. Va. 741, 744.

Wisconsin. — Man-zau-mau-ne-kah *v.* United States, 1 Pin. 124; The State *v.* McBride, 26 Wis. 409; Rowan *v.* The State, 30 Wis. 129; Chase *v.* The State, 50 Wis. 510, 513.

United States. — United States *v.* Travers, 2 Wheeler Crim. Cas. 490; United States *v.* Holmes, 5 Wheat. 412; United States *v.* Dawson, Hemp. 643; United States *v.* Plumer, 3 Clif. 28, 29; United States *v.* Gnitean, Official Record of the case, 1.

[1] Unnecessary. Crim. Proced. II. § 505.

[2] Introduced by me to elevate the charge to murder in the first degree, as see ante, § 516–520.

[3] 3 Chit. Crim. Law, 765. **With a Cart.** — For a form for manslaughter by riding over one with a cart, see Crim. Proced. II. § 502.

[4] I should omit this word "situate" for reasons appearing ante, § 179, 253, 444, and places there referred to.

[5] This word "mortally" is not in Chitty. I should insert it for reasons explained ante, § 520, note.

[6] 3 Chit. Crim. Law, 770; Johnson *v.* Commonwealth, 12 Harris, Pa. 386.

as the statutory words may be] *malice aforethought* put and lay, and the same did then and there [feloniously and of his DELIBERATELY PREMEDITATED (*or*, &c. as above) *malice aforethought* [1]], set fire to and cause to be burnt and consumed, inflicting thereby, and by means of the flames thereof, upon the said X, on his breast, belly, arms, legs, head, neck, and other parts of his body, divers mortal burns, sores, and wounds.[2]

§ 525. **By Duress and Starving.** — And that the said A, on, &c. and thence continually until, &c. [ante, § 83], at, &c. did feloniously and of his DELIBERATELY PREMEDITATED [*or*, &c. as the statutory expression may be] *malice aforethought*, confine and imprison the said X in a certain room in the dwelling-house of him the said A there, and during all which time did there feloniously and of his DELIBERATELY PREMEDITATED [*or*, &c. as above] *malice aforethought* neglect, omit, and refuse to give and administer, and to permit and suffer to be given and administered, to the said X sufficient meat, drink, and food necessary for the sustenance, support, and maintenance of the body of him the said X, by means whereof the said X, on the day first above mentioned, became, and thence continually until the day last mentioned remained and was, mortally sick, feeble of body, emaciated, and starved; of which [to carry the form a little further than in the above sections] mortal sickness, feebleness of body, emaciation, and starvation the said X did there, on the said last-mentioned day, die. And so, &c.[3]

§ 526. **Murder of New-born Child by Abandonment.** — The indictment may be modelled after the last form. Or, following in the main a precedent adjudged good, yet omitting obvious surplusage, it may allege, —

That A, &c. on, &c. at, &c. was delivered of a certain male child, whereof she then and there had the care and custody [and for whom it was then

[1] This repetition is probably not necessary, while yet most pleaders would choose to insert it, as see ante, § 520, note.

[2] Errington's Case, 2 Lewin, 217.

[3] The above are believed to be all the allegations necessary. But the victim is generally a child, apprentice, or old and feeble person, or one otherwise dependent; and it is common, and perhaps practically judicious, to recite the special facts of this sort. The pleader will need no instructions for doing this when he deems it desirable. And see ante, § 459; post, § 526. For other analogous forms, see the following: For confining and starving an apprentice, 3 Chit. Crim. Law, 777; Matthews Crim. Law, 499; Archb. Crim. Pl. & Ev. 10th ed. 431. Archbold, referring to Reg. *v.* Edwards, 8 Car. & P. 611, observes, "Where the indictment charges an imprisoning, that sufficiently shows the duty to supply food; but, if it do not, then it must allege a duty in the defendant to supply the deceased with food." Against one having the care of an infant and under obligation to supply its wants, for refusing needful food, Reg. *v.* Bubb, 4 Cox C. C. 455. For hiding and starving an infant, Rex *v.* Taylor, 4 Went. Pl. 45. For confining prisoner in an unwholesome room, and otherwse occasioning his death by duress of imprisonment, 3 Chit. Crim. Law, 771. For confining an aged and infirm woman, and furnishing her insufficient food and clothing, Reg. *v.* Marriott, 8 Car. & P. 425. **Other Forms.** — For murder by forcing a sick person into the street, 3 Chit. Crim. Law, 771. For murder by forcing one to drink spirits to excess, 3 Chit. Crim. Law, 770,

and there her duty to provide[1]]; and afterward, then and there, the said male child being, by reason of his tender age, utterly incapable of making known his natural wants, and incapable of making any provision for supplying them, the said A, well knowing the same, did, upon said male child, feloniously and of her DELIBERATELY PREMEDITATED [*or*, &c. following the terms of the statute creating murder in the first degree] *malice aforethought* make an assault, and did then and there feloniously and of her DELIBERATELY PREMEDITATED [*or*, &c. as above] *malice aforethought* secretly place, put, leave, desert, and abandon the said male child in a certain stone wall, alone and apart from human habitation, at, &c. aforesaid, in a condition wholly destitute and unprotected; the said male child then and there remaining and being, because of his tender age, utterly incapable of making known his natural wants, and incapable of providing and procuring for himself necessary attention, support, and maintenance; in consequence whereof, and by reason of the aforesaid abandonment, and of the other premises aforesaid, he, the said male child, for want of needful food and sustenance, and of due and proper care and attention, and by and through the inclemency of the weather, there and then languished in mortal weakness, helplessness, destitution, and want for the space of half an hour, and then and there, in the manner and by the means and causes aforesaid, died. And so, &c. [as at ante, § 520].[2]

§ 527. **Murder of Child through Abortion.** — For procuring, by abortion, a child to be so prematurely born that it dies from exposure to the external world,[3] the allegations may be, —

That on, &c. at, &c. one X was quick with a certain male child, whereupon A, &c. did then and there, well knowing the premises, feloniously and of his *malice aforethought*[4] make an assault on said male child so as yet unborn, and did then and there, holding in his right hand a certain pin [*or*, a certain sharp and pointed instrument to the jurors unknown, *or*, &c. as in ante, § 142], feloniously and of his *malice aforethought* force and thrust his said right hand and the said pin [*or*, &c.] up and into the body and womb of the said X, thereby causing her the said X then and there prematurely to bring forth from her womb into the external world, and prematurely to separate from connection with her, the said male child while yet alive but unable to bear such premature birth and separation; by means whereof the said male child then and there became and was mortally weak-

[1] This matter in brackets is not in the form before me, nor do I deem it necessary under the other facts alleged. Yet in various similar cases it is important, nor would its insertion be ever harmful. Reg. *v.* Pinhorn, 1 Cox C. C. 70.

[2] Reg. *v.* Kelly, Jebb, 299. For similar precedents, see Stockdale's Case, 2 Lewin, 220; Rex *v.* Edwards, 8 Car. & P. 611; Reg. *v.* Waters, 1 Den. C. C. 356, 2 Car. & K. 864, 3 Cox C. C. 300; Reg. *v.* Pinhorn, supra.

[3] Crim. Law, I. § 328; II. § 633.

[4] I omit the words for charging murder in the first degree; because, although it is doubtless legally possible for one to commit this degree of murder so, we can scarcely imagine such a case to exist in actual fact.

ened, debilitated, and emaciated in his body; of which said mortal weakness, debility, and emaciation of the body the said male child then and there for the space of five hours did languish, and languishing did live, and at the end of said five hours did then and there die. And so, &c. [as at ante, § 520].[1]

§ 528. **Murder of Mother through Abortion.** — A form under a statute making this an aggravated abortion has already been given.[2] In States where there is no such statute, the killing in this way will be either common-law murder[3] or statutory murder in the second degree, or manslaughter, according as the laws of the particular State may be. It is believed to be nowhere murder in the first degree.[4] The allegations, to be more or less varied with the differing terms of statutes, may be, —

That A, &c. on, &c. at, &c. in and upon one X feloniously and of his *malice aforethought* [did make an assault[5]], and did then and there feloniously and of his *malice aforethought* force, thrust, and strike a certain instrument, to the jurors unknown, which he the said A then and there had and held in his right hand, up and into the womb and body of the said X [*or*, &c. setting out such other method of abortion as the proofs will disclose[6]], who was then and there pregnant with child, with the criminal intent thereby to cause and procure, without legal justification [*or*, &c. varying the expression with the statutes against abortion], the said X to miscarry, thereby then and there inflicting on the said X, in and about her womb and other internal parts, certain mortal bruises, wounds, and lacerations, and creating in the said X a mortal sickness and feebleness of body, of which mortal bruises, wounds, lacerations, sickness, and feebleness of body she the said X did then and there languish, &c. [following the form ante, § 520, onward to its close].[7]

[1] Reg. *v.* West, 2 Car. & K. 784, 2 Cox C. C. 500. I have omitted some clearly unnecessary allegations, and slightly varied in terms some of the others. And, though the facts in this particular case occurred on different days, I have charged all as on one day; deeming such to be ordinarily the better method. Crim. Proced. I. § 397. But the pleader can easily vary the form, should he wish, so as to aver the several facts as of the dates when they respectively transpired.

[2] Ante, § 143.

[3] Crim. Law, II. § 691; ante, § 143.

[4] Crim. Law, II. § 723–730. Yet query under such a statute as that of Alabama. Ib. § 728. And see the cases cited at the end of the form.

[5] There is no reason to suppose this charge of assault necessary, while yet to make it accords with common forms. Ante, § 139, 520, note.

[6] See, for various forms of this allegation, ante, title ABORTION. But the pleader should weave into it the expressions peculiar to murder.

[7] I have in some measure followed herein the precedent in The State *v.* Wood, 53 N. H. 484. And for other forms see People *v.* Jackson, 3 Hill, N. Y. 92; Hunt *v.* People, 3 Parker C. C. 569; Cobel *v.* People, 5 Parker C. C. 348; Beasley *v.* People, 89 Ill. 571, 573; Bechtelheimer *v.* The State, 54 Ind. 128.

§ 529. **Medical Malpractice, &c.** — The grade of homicide by medical or surgical malpractice will seldom be higher than manslaughter.[1] The indictment should set out the special facts, which will vary with the cases; and the better and safer way is to weave them into one of the foregoing models, omitting the words there printed in small capitals and italics. Still the pleader may like to have before him the following form, somewhat departing from the common approved forms, whereon, in a case of neglect, a defendant who was a surgeon and man-midwife was convicted and sentenced: —

That on, &c. at, &c. X the wife of Y was pregnant and laboring with child, and that A, &c. then and there took the care and charge of the said X, as a man midwife, and to assist and attend upon and to take care of her the said X, and to do everything needful and proper to and for her during and after the time of her labor and delivery of the said child wherewith the said X was then pregnant; and that the said A afterwards, and whilst he had such care of the said X as aforesaid, and immediately after the said X was delivered of the said child wherewith she had then lately before been pregnant, to wit, on, &c. at, &c. in and upon the said X feloniously did make an assault,[2] and her the said X, lying on a bed in great illness, pain, and weakness, did on said last-mentioned day there feloniously neglect and refuse to attend upon, and to take proper, sufficient, and necessary care of, and to render her proper and necessary assistance, and did then on said last-mentioned day there feloniously neglect and refuse to do to and for her, being in such state, and did then on said last-mentioned day there leave and desert the said X in such state as aforesaid without a proper and sufficient person to take care of her, and to do for her what was needful for her, being in such state, and unable to take care of and to do what was needful and necessary for herself; and that by reason and means of the said A there on said last-mentioned day so neglecting and refusing as aforesaid to do to and for her the said X what was needful and proper for her, and by the said A so leaving and deserting the said X as aforesaid, the said X [became mortally sick, emaciated, and enfeebled in body, and of said mortal sickness, emaciation, and feebleness of body [3]] there, on, &c. died. And so the jurors do say, that the said A, her the said X, in manner and by the means aforesaid, feloniously did kill and slay; against the peace, &c.[4]

[1] Crim. Law, I. § 217, 314, 558; II. § 664, 685, 693.

[2] This allegation of assault in such a case is plainly needless. Ante, § 520, note.

[3] Not in the form which I am in the main copying. But, in States where the strict common-law rules prevail, I should, at least as a matter of prudence, insert it.

[4] Ferguson's Case, 1 Lewin, 181. For other forms, see Reg. *v.* Ellis, 2 Car. & K. 470; Rex *v.* Spiller, 5 Car. & P. 333; Rex *v.* Long, 4 Car. & P. 423; Reg. *v.* Spilling, 2 Moody & R. 107; Webb's Case, 2 Lewin, 196. Against a person ignorantly acting as a physician and causing death, Rice *v.* The State, 8 Misso. 561. Against one

§ 530. **Manslaughter by Neglect of Duty.** — The form in the last section is of this sort. For a husband's neglect of his wife, by reason whereof she dies, the allegations may be, —

That A, &c. on, &c. at, &c. being the husband of one X his wife, under the legal duty to provide for her necessary clothing, shelter, and protection from the frost, cold, and inclemency of the weather, and then and there having the means to provide the same, and she the said X being then and there weak, feeble, destitute, and infirm, and unable to go abroad, did then and there feloniously and wilfully neglect and refuse to provide necessary clothing, shelter, and protection from the frost, cold, and inclemency of the weather for his said wife, whereby her health was greatly injured; and he, the said A, afterward, to wit, on the next succeeding day and on every day between the said day first named and the day of her death hereinafter to be mentioned, did there feloniously and wilfully continue to neglect and refuse to provide her the said X with necessary clothing, shelter, and protection from the frost, cold, and inclemency of the weather, the said A being there on all said days and times her husband as aforesaid, and having the means to provide the same as aforesaid, and under the legal duty to provide the same as aforesaid, and she the said X having no means to provide the same as aforesaid, and being weak, feeble, destitute, infirm, and unable to go abroad as aforesaid. By reason whereof the said X there on all the days and times before mentioned, until, &c. sickened and languished with a mortal sickness and feebleness of body so as aforesaid created and produced by the said A, until, on the said last-mentioned day, at said, &c. she, the said X, there of said mortal sickness and feebleness of body died. And so the said A her the said X, in manner and by the means aforesaid, feloniously did kill and slay; against the peace, &c.[1]

§ 531. **Indictable Civil Injury of Causing Death.** — Under the statutes on this subject[2] the homicide, for which an indictment is provided as a civil remedy, is not felonious. It is neither mur-

falsely pretending to be a physician, The State *v.* McBride, 26 Wis. 409. Causing death by administering noxious and improper medicine, Rex *v.* Webb, 1 Moody & R. 405.

[1] In The State *v.* Smith, 65 Maine, 257, this form was adjudged good. It was first published in "Criminal Procedure" (Crim. Proced. 2d ed. II. § 538), where it was a sort of compilation from the forms in Rex *v.* Ridley, 2 Camp. 650; Reg. *v.* Crumpton, Car. & M. 597; and Reg. *v.* Plummer, 1 Car. & K. 600. And see 3 Cox C. C. App. 75. **Other Neglects.** — See, for forms, — Against the owner of an unlicensed passenger boat, causing death by overloading it, Reg. *v.* Williamson, 1 Cox C. C. 97. Against a pilot, causing death by bad management of the vessel, Reg. *v.* Spence, 1 Cox C. C. 352. Careless navigation, running down a boat and drowning a man, Reg. *v.* Taylor, 9 Car. & P. 672. Against a railroad conductor for causing death by running his train in disobedience of rules, Commonwealth *v.* Hartwell, 128 Mass. 415. Same for negligently driving his engine against another engine, causing death, 3 Cox C. C. App. 57. Neglect to give the proper signal, Reg. *v.* Pargeter, 3 Cox C. C. 191. Various neglects at coal mines, Reg. *v.* Whitehouse, 5 Cox C. C. 144; Reg. *v.* Barrett, 2 Car. & K. 343; Reg. *v.* Haines, 2 Car. & K. 368.

[2] Stat. Crimes, § 467–470.

der nor manslaughter. Therefore strictly we should give this topic a separate chapter, yet practically it is well enough here. The statutes are numerous and diverse, and the indictment must cover the particular one on which it is drawn. On the words, "If the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this Commonwealth, such proprietor or proprietors and common carriers shall be liable to a fine not exceeding five thousand dollars nor less than five hundred dollars, to be recovered by indictment to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs; one moiety thereof to go to the widow, and the other to the children of the deceased, but if there shall be no children, the whole to the widow, and if no widow, to heirs according to the law regulating the distribution of intestate personal estate among heirs," [1] we have a form which was adjudged good. It is, — not inquiring whether it might not be shorter, —

That the A Railroad Corporation, a body politic and corporation duly and legally established in this Commonwealth, were, on, &c. the proprietors of a certain railroad leading and extending from M to N, through the town of O, in the county of [the indictment], called and known by the name of the Q Railroad, and were common carriers of passengers over, upon, and along said railroad, and being such proprietors and common carriers of passengers did, by their agents and servants, on the said, &c. at the said, &c. run, conduct, and drive a certain engine and train of cars, in one of which said cars X was then and there a passenger over, upon, and along said railroad, and by their agents and servants then and there had the custody, care, and management of said railroad, engine, and cars, and by the gross negligence and carelessness of their said agents and servants said railroad was suffered to be and was then and there out of repair and defective, and the rails thereof uneven and in a condition unsuitable and dangerous for the passage of engines and cars upon, over, and along the same, and the aforesaid engine and train of cars run, conducted, and driven as aforesaid were then and there, by the gross negligence and carelessness of the said agents and servants, run, conducted, and driven with great unreasonable and improper speed, and in an unsafe and unskilful manner, by means of all which the aforesaid car wherein the said X was then and there a passenger as aforesaid, was then and there thrown with great vio-

[1] Mass. Stat. 1840, c. 80.

lence from the track of said railroad and broken in pieces, whereby divers injuries, bruises, and wounds were then and there inflicted on the head, body, and limbs of said X, of which said injuries, bruises, and wounds he the said X then and there instantly died. And so the jurors aforesaid on their oath aforesaid do say, that the life of said X, being a passenger as aforesaid, was then and there lost by reason of the gross negligence and carelessness of the aforesaid agents and servants of said A Corporation, in manner and form aforesaid; the names of which said agents and servants are to the jurors aforesaid unknown; whereby said A Corporation have become liable to a fine not exceeding five thousand dollars nor less than five hundred dollars, to be recovered by indictment to the use of the executor or administrator of said deceased person, for the benefit of his widow and heirs; and that Y has been duly appointed and now is administrator of said X deceased, and of his goods and estate, and that there is no widow nor are there children of said X; and that there are heirs of the said X, according to the law regulating the distribution of intestate personal estate among heirs now living, whose names are to the jurors unknown; against the peace, &c.[1]

§ 532. **First Degree Murder of another Sort.** — Not all murders of the first degree depend, like those for charging which the forms have already been given, on an aggravated malice aforethought in the mind of the murderer. Most of the statutes provide that, in addition to such distinction, all murders by poison, and by perpetrating or attempting to perpetrate arson, rape, robbery, or burglary shall be in this higher degree. The special condition of the offender's mind, in other words the sort of malice aforethought, has nothing to do with these murders; they are in the first, and there is no second degree of them.[2] If the indictment avers simply the malice aforethought, not introducing the words "deliberately premeditated" or any other similar ones, and then sets out the killing as having been effected by POISON, or by an actual or attempted ARSON, RAPE, ROBBERY, or BURGLARY, it duly alleges a murder in the first degree. But the words here printed in small capitals cannot, as in the other sort of murder in the first degree, be stricken out and leave an accu-

[1] Commonwealth *v.* Boston and Worcester Railroad, 11 Cush. 512. Mere verbal abridgments of this form are readily made. In the present condition of the authorities I could not serve the pleader much by pointing out others, without entering into discussions with which I do not deem it advisable to encumber this volume. For other forms, see The State *v.* Manchester, &c. Railroad, 52 N. H. 528, 530; Commonwealth *v.* Coburn, 132 Mass. 555; Commonwealth *v.* Fitchburg Railroad, 120 Mass. 372; The State *v.* Maine Central Railroad, 60 Maine, 490; The State *v.* Grand Trunk Railway, 60 Maine, 145.

[2] Crim. Law, II. § 723–725, 727.

sation of murder in the second degree; because, among other reasons, there is, as just said, no murder in the second degree where the life is taken by any of the means here specified.[1] Hence, in the forms to follow, the words indicating the degree will not, as in the foregoing, be put in small capitals.

§ 533. **By Poison.** — Ordinarily, at common law, a felonious killing by poison is murder; but it may be, and it sometimes is, manslaughter. And, as just seen, generally in the States wherein murder is of two degrees, it is of the first degree, and it has no second. Therefore, under the statutes creating degrees, the indictment is in the same form as at the common law. There is a precedent for it in "Criminal Procedure;"[2] and it is there, in connection with the precedent, pretty fully explained. But the following, into which are introduced some diversities in the allegations, will be found convenient: —

That A, &c. on, &c. at &c. did feloniously and of his *malice aforethought* [devising and intending, &c.[3] make an assault, &c.[4]] administer to and cause to be taken by one X into his stomach a deadly quantity of a certain deadly poison called strychnine,[5] he the said A then and there well knowing the same to be, in quantity and kind as so administered and taken, a deadly poison[6] [*or*, in substance copying allegations found in the books, feloniously, &c. did put, infuse, mix, and mingle in and together with

[1] And see Crim. Proced. II. § 588, 589.

[2] Crim. Proced. II. § 553.

[3] It is common to allege here that the defendant meant to kill the deceased. But this is unnecessary, and it is better omitted. Crim. Proced. II. § 554.

[4] Many of the precedents aver an assault here, as at ante, § 520. Others do not; and unquestionably this averment is needless. Crim. Proced. supra.

[5] I should state the name of the poison, and should deem its omission in most of our States unsafe. Crim. Proced. II. § 555; ante, § 139, note,

[6] I put the averment thus because I believe it to be the proper form in just legal doctrine and practical convenience, though I have not seen it precisely so in any precedent. Under this averment, according to my understanding, the proof may be that the poison was given either pure or mixed with other ingredients, by the defendant with his own hands, or through an innocent agent, or through a guilty agent in his presence, or left by him for the murdered person to find and take. Of course, as every court rules the law according to its own views, it is impossible for me to say that a particular tribunal will accept as correct what is here set down. Were I in practice before some judges, I should certainly add a count more nearly after the common precedents; before other judges, I should not. In Commonwealth *v.* Hersey, 2 Allen, 173, allegations which appear to have been regarded by the tribunal as sufficient were, —

Did feloniously, &c. give and administer a certain large quantity, to wit, ten grains in weight, of a certain deadly poison called strychnine, he the said A then and there well knowing the same to be a deadly poison, with the intent that the said X should then and there take and swallow down the same into her body, and the said X the said strychnine, so given and administered as aforesaid, did then and there take and swallow into her body, and by reason thereof became then and there mortally sick and distempered in her body, and of said mortal sickness and distemper did, &c.

water a certain quantity of arsenic, to wit, two drachms of arsenic, being a deadly poison, then and there well knowing the said arsenic to be a deadly poison, and the said arsenic, so put, infused in, and mixed and mingled in and together with water, into a certain glass vial bottle did put and pour, and the said glass vial bottle with the said arsenic put, infused in, and mixed and mingled in and together with water as aforesaid contained therein, then and there feloniously and of his *malice aforethought* in the lodging-room of the said X did put and place, in the place and stead of a certain medicine then lately before prescribed and made up for the said X and to be taken by the said X, he the said A then and there feloniously and of his *malice aforethought* intending that the said X should drink and swallow down into his body the said arsenic put, infused, mixed, and mingled in and together with water as aforesaid, contained in the said glass vial bottle, by mistaking the same as and for the said medicine so prescribed and made up for the said X and to be by him taken as aforesaid; and the said X, not knowing the said arsenic put, infused in, and mixed together with water as aforesaid, contained in the said glass vial bottle so put and placed by the said A in the lodging-room of the said X in the place and stead of the said medicine then lately before prescribed and made up for the said X and to be taken by him the said X in manner aforesaid, to be a deadly poison, but believing the same to be the true and real medicine then lately before prescribed and made up for and to be taken by him the said X, afterward, on, &c. at, &c. aforesaid, the said arsenic so as aforesaid put, infused in, and mixed together with water by the said A as aforesaid contained in the said glass vial bottle so put up and placed by the said A in the lodging-room of him the said X in the place and stead of the said medicine then lately before prescribed and made up for the said X, he the said X did take, drink, and swallow down into his body[1]]; by means of the taking of which deadly poison into the stomach and body of the said X, he the said X became then and there mortally sick and distempered in his body, of which said mortal sickness and distemper of body, &c. [as at ante, § 520].[2]

[1] 3 Chit. Crim. Law, 775. No wonder those who really suppose that the common law requires such ridiculously verbose forms as this, hold it in contempt and desire to have it codified and amended.

[2] And see, for forms, Crim. Proced. II. § 553; 3 Chit. Crim. Law, 772–778; 2 Cox C. C. App. 4; Rex *v.* Weston, 2 Howell St. Tr. 911; Rex *v.* Blandy, 18 Howell St. Tr. 1118; Reg. *v.* Saunders, 2 Plow. 473; Vaux's Case, 4 Co. 44 *a*, Rex *v* Clark, 1 Brod. & B. 473; Reg. *v.* Michael, 2 Moody, 120, 9 Car. & P. 356 (giving laudanum through innocent agent); Reg. *v.* Sandys, 2 Moody, 227, Car. & M. 345; Reg. *v.* Webb, 1 Moody & R. 405; Reg. *v.* Packard, Car. & M. 236 (getting a man to drink excessive quantities of intoxicating liquor, &c.); Snyder *v.* The State, 59 Ind. 105 (murder of first degree under statute); Commonwealth *v.* Hersey, 2 Allen, 173; Josephine *v.* The State, 39 Misso. 613; People *v.* Robinson, 2 Parker C. C. 235; People *v.* Hartung, 4 Parker C. C. 256; Stephens *v.* People, 4 Parker C. C. 396, 399; Robbins *v.* The State, 8 Ohio State, 131; Blackburn *v.* The State, 23 Ohio State, 146; Commonwealth *v.* Earle, 1 Whart. 525; Marshall *v.* The State, 5 Texas Ap. 273, 274.

§ 534. **By Rape.** — A rape, actual or attempted, resulting in the victim's death, is murder at the common law.[1] And we have seen that, under the statutes of some of our States, it is, like the poisoning set out in the last form, murder in the first degree, having no second degree.[2] Precedents for the indictment do not abound in the books, but it may charge, —

That A, &c. on, &c. at, &c. in and upon one X[3] did feloniously and of his *malice aforethought* make an assault,[4] intending and attempting then and there and thereby feloniously to ravish and carnally know the said X violently and against her will;[5] and did then and there, while so intending and attempting, and in execution of such intent and attempt, feloniously and of his *malice aforethought*, with his private member and by other means to the jurors unknown, penetrate the body of the said X, and wound, lacerate, and ill-treat her in her private parts, womb, and other internal portions of her body, inflicting thereby, in and upon her the said X, in her said private parts, womb, and internal body, certain mortal bruises, wounds, contusions, lacerations, and injuries, with which she then and there and thence continually until, &c. languished, and on said last-mentioned day did thereof there die. And so, &c. [as in ante, § 520].[6]

§ 535. **By Combined Causes.** — The foregoing forms have, for perspicuity, been constructed on the plan of alleging for the death only a single cause. But often the causes are in fact numerous, all operating together. And we have seen that, in general, the true — at least, the better — way is to charge in one count all the not-inconsistent causes which will appear in the proofs at the trial, and it will be sustained by satisfying the jury of any of them.[7] The pleader will require no help in constructing his allegations according to this suggestion.[8] Where one sort

[1] Crim. Law, II. § 694.

[2] Ante, § 532.

[3] It is believed that, within our statutes creating murder in the first degree, the carnal knowledge of a girl whom the law deems too young to consent — that is, in most of our States, under ten years — is rape, though in fact she consents. Stat. Crimes, § 480, 482, 484, 485. Still I am not aware that this question has been judicially passed upon. Assuming the affirmative, if the girl was below ten and consented, there should be an allegation here that she was under ten. Rex *v.* Lad, 1 Leach, 4th ed. 96; Stat. Crimes, § 486.

[4] The averment of an assault is common in rape, but it is not legally indispensable. Crim. Proced. II. § 955. And plainly, while in the indictment for murder it is proper, its omission would not render the indictment bad. Ante, § 520, note.

[5] Or, if the girl was under ten years and she consented, say here "feloniously and unlawfully to carnally know and abuse the said X."

[6] Of course, the pleader will more or less modify these allegations to cover the actual facts as they will appear at the trial. For a partial and imperfect form, see Rex *v.* Lad, supra.

[7] Ante, § 14–21.

[8] For illustrative forms see The State

of killing — as, for example, such as is set out in either of the last two sections — is murder of the first degree when committed simply of *malice aforethought* and it has no second degree, and another sort of killing is murder in the first or second degree according as the *malice aforethought* is DELIBERATELY PREMEDITATED or not, there are practical objections to weaving the two into one count, which should lead the pleader to avoid it, whatever may be his opinion as to what would be the judgment of the court thereon.

§ 536. **Death out of Jurisdiction.** — There is, in the criminal law, no jurisdiction by fiction. So that, when the blow was given in the county of the indictment and the death occurred elsewhere, the proper way is to allege each according to the real fact. If the proofs do not disclose a jurisdiction, the defect cannot be supplied by false averment.[1]

§ 537. **Wound out of Jurisdiction.** — If the court has authority to take cognizance of a case by reason of the death having been within its jurisdiction while the mortal wound was inflicted elsewhere,[2] the same rule still applies; namely, the indictment should charge the place of the transactions according to the fact. For example, where, in such a case, the deceased was wounded on the high seas and died on land, the wounding will be charged to

v. McDonald, 67 Misso. 13; Commonwealth *v.* Macloon, 101 Mass. 1; Howard *v.* The State, 34 Ark. 433, 435.

[1] Crim. Proced. I. § 381; ante, § 116, note, 286, note. In United States *v.* Guiteau, Official Record of the case, 1 et seq. for the murder of the late President Garfield, where the mortal injury was inflicted in Washington, D. C., and the death was in Monmouth Co., N. J., the indictment, which was in ten counts, laid the place of the death in all manner of ways. Thus, one count would allege it to have been in the District of Columbia; another, in New Jersey; another in the District of Columbia, to wit, New Jersey; another in New Jersey, to wit, the District of Columbia. As the question whether or not the court would sustain the jurisdiction was sufficiently in doubt to suggest caution, and the case was of world-wide notoriety, one cannot much blame the pleader for thus "clutching at straws." In one of the counts there was a special averment, which, though legally unimportant on a just view of the case, and as ultimately regarded by the court, was under the circumstances highly commendable for its practical good sense; because founded in opinions once judicially entertained, and still preserved in our books. There was a chance of its proving the salvation of the whole proceeding. I should recommend its insertion in any other case under similar doubts. After stating the death on, &c. "at the county of Monmouth, in the State of New Jersey," the count proceeds, —

> And thereafter, to wit, on, &c. the dead body of the said X was removed from the said county of Monmouth and State of New Jersey and brought into the county of Washington and District of Columbia, within which said last-mentioned county it lay and remained from, &c. until, &c.

[2] For expositions of this question, see Crim. Law, I. § 112–116; Crim. Proced. I. § 50–53.

have transpired on the high seas, and then the averments will proceed, —

And after the said mortal wounds, bruises, &c. were so as aforesaid inflicted on the said X by the said A, he the said X came into the county of, &c. and there languished of the same until, on, &c. he did there of the same die. And so, &c. [as at ante, § 520].[1]

§ 538. **On High Seas, &c.** — How the allegations of place should be, where the homicide was on the high seas or abroad, we have already seen.[2] Forms in homicide, wherein it was so, are referred to in the note.[3]

§ 539. **Accessories, &c.** — How the forms should be where there are principals as well of the second degree as the first, and accessories, in cases of felony generally, we have already seen.[4] Most of the precedents in murder enlarge the expressions "was feloniously present," "did feloniously counsel," &c. to "was feloniously and of his malice aforethought present," "did feloniously and of his malice aforethought counsel," &c. Not all do.[5] In reason, the counselling and the like should be charged to have been done "feloniously," to distinguish the offence of the accused person from misdemeanor and treason. But the charge that the principal of the second degree was "present aiding, inciting, and abetting" the principal of the first degree; or that the accessory before the fact procured the principal to commit the offence "in manner and form aforesaid," covers as well the "malice aforethought" as the rest of what has been alleged against the principal of the first degree. Still, for caution, the prudent pleader will be likely to employ the enlarged form. It, with its accompanying averments, is made to occupy different places in the

[1] For a precedent, see Commonwealth *v.* Macloon, 101 Mass. 1, 2.

[2] Ante, § 89.

[3] 3 Chit. Crim. Law, 753, 759; Rex *v.* Clarke, 4 Went. Pl. 47; Rex *v.* Kidd, 14 Howell St. Tr. 123, 130; Rex *v.* Coombes, 1 Leach, 4th ed. 388; Rex *v.* Hindmarsh, 2 Leach, 4th ed. 569; Rex *v.* Depardo, Russ. & Ry. 134; Reg. *v.* Serva, 2 Car. & K. 53, 1 Cox C. C. 292; Reg. *v.* Sawyer, 2 Car. & K. 101; Reg. *v.* Bernard, 1 Fost. & F. 240, 243; Reg. *v.* Keyn, 13 Cox C. C. 403, 404; United States *v.* Holmes, 5 Wheat. 412; United States *v.* Plumer, 3 Clif. 28, 29.

[4] Ante, § 113–118.

[5] Thus, in Parker's Case, 2 Dy. 186 *a*, the indictment charged the principal of the first degree with committing the murder feloniously and of malice aforethought, the principal of the second degree simply with being present, &c. feloniously; the accessory before the fact, with "feloniously," &c. only; and the accessory after the fact the same. Parker was accessory both before and after; "and," says the report, "although he was a clergyman, yet he was hanged for the procurement aforesaid."

precedents, but the best is after the clause "and so," &c. and before "against the peace," &c.[1] It would be useless to repeat the forms here, but some references to cases in homicide containing them will be convenient.[2]

§ 540. **On Statutes.** — Most of the indictments on statutes creating murder and manslaughter follow, in the absence of statutory direction, these common-law forms. But there are statutes in terms so departing from the common-law definitions of these offences as to require the allegations to be modified.[3] This observation relates to but a few States, and to statutes differing from one another. For which reason, and because the modifications required will be palpable to the pleader and easily made, it would not be a wise use of our space to give such modified forms here. But in a note some cases will be referred to, wherein appear explanations besides those in the place last cited, and forms on these statutes. Thus the pleader will have at command all needed help.[4]

II. *The Indictment as modified by Statutes.*

§ 541. **Everywhere — (Right to elect).** — It is believed that in all our States, with the slight qualification mentioned in the last section, applicable only to a few States, the forms given in the last sub-title are adequate. Where others are provided by statute, the pleader may elect between them and those of the common law; but he cannot employ a form not before permissible,

[1] And see Crim. Proced. II. § 3–9.

[2] 3 Chit. Crim. Law, 753–756, 761–764, 766; Rex *v.* Clarke, 4 Went. Pl. 47; Rex *v.* Doughty, Trem. P. C. 285; Rex *v.* Atkins, 7 Howell St. Tr. 231; Rex *v.* Goodere, 17 Howell St. Tr. 1003; Rex *v.* White, 17 Howell St. Tr. 1079; Rex *v.* Annesley, 17 Howell St. Tr. 1094; Parker's Case, 2 Dy. 186 *a*; Reg. *v.* Saunders, 2 Plow. 473; Mackalley's Case, 9 Co. 61 *b*; Rex *v.* Taylor, 1 Leach, 4th ed. 360; Reg. *v.* O'Brian, 1 Den. C. C. 9, 1 Cox C. C. 126; Reg. *v.* Downing, 2 Car. & K. 382; Reg. *v.* Pym, 1 Cox C. C. 339; Reg. *v.* Richards, 2 Q. B. D. 311, 13 Cox C. C. 611; Rex *v.* Foy, Vern. & S. 540; Reg. *v.* Breden, 16 U. C. Q. B. 487; Reg. *v.* Greenwood, 23 U. C. Q. B. 255; The State *v.* Coleman, 5 Port. 32; Studstill *v.* The State, 7 Ga. 2; Commonwealth *v.* Roberts, 108 Mass. 296; Commonwealth *v.* Chiovaro, 129 Mass. 489; The State *v.* Hopper, 71 Misso. 425, 427; People *v.* Hartung, 4 Parker C. C. 256; The State *v.* Rabon, 4 Rich 260; The State *v.* Ayers, 8 Baxter, 96; Hawley *v.* Commonwealth, 75 Va. 847.

[3] Stat. Crimes, § 471–476.

[4] Dukes *v.* The State, 11 Ind. 557; Snyder *v.* The State, 59 Ind. 105; Kennedy *v.* The State, 62 Ind. 136; Shepherd *v.* The State, 64 Ind. 43; The State *v.* Stanley, 33 Iowa, 526; Robbins *v.* The State, 8 Ohio State, 131; Blackburn *v.* The State, 23 Ohio State, 146; Rufer *v.* The State, 25 Ohio State, 464.

on the ground that, though differing from the statutory one, it is in reason as good.[1]

§ 542. **Short Form.** — Legislation in England, in 1851, adopted afterward in Canada, authorized a very short form in these homicide cases.[2] It has been incorporated into the statutes of several of our States, in a part of them literally, in the others modified. And thus far the constitutionality of it has been upheld by our courts.[3] Under the unmodified statutory terms the allegations for murder may be, —

That A, &c. on, &c. at, &c. feloniously, wilfully,[4] and of his malice aforethought[5] did kill and murder X; against the peace, &c.[6]

§ 543. **Other Short Forms.** — The form thus given, containing nothing to identify or individualize the transaction except the name of the person killed, runs very close to what is inadmissible either in natural justice or under our constitutions, — too close to be commendable. Hence, some of our States that have adopted short forms have not gone so far. And in some States, where the English words have been enacted, pleaders have in practice been considerate, and introduced identifying matter not in terms required. Thus, —

That A, &c. on, &c. at, &c. in and upon the body of one X feloniously, wilfully, and of his malice aforethought did make an assault, and him the

[1] Nichols *v.* The State, 46 Missis. 284.

[2] Crim. Proced. II. § 523; Whelan *v.* Reg. 28 U. C. Q. B. 2.

[3] Crim. Proced. II. § 539.

[4] "Wilfully." — In forms drawn after the common-law rules, it has hitherto been common to insert in this place the word "wilfully" in addition to "of his malice aforethought," — unnecessarily, as already explained. Ante, § 520, note. And on a statute making it murder for one to kill another "wilfully and of his malice aforethought," it is plain that an indictment which omitted the word "wilfully," but had "maliciously," &c. or more accurately, "of his malice aforethought," would be good; because an indictment in this sort of case is required to cover only the statutory meaning, and it is settled in adjudication that "maliciously" signifies whatever is meant by "wilfully," and more. So that "maliciously" is a good substitute in any indictment for the statutory "wilfully," though the latter would not suffice in place of the former. Crim. Proced. I. § 613; II. § 43, 922; McCoy *v.* The State, 3 Eng. 451. But the statute now in question is different. It declares it to be unnecessary in the indictment to set out the manner, &c. of the killing, but it shall suffice to charge "that the defendant did feloniously, wilfully, and of his malice aforethought kill," &c. Is *this* statute complied with when "wilfully" is omitted? In the absence of decisions that it is, I should deem it, at least, prudent to retain the word "wilfully" in the allegation.

[5] In Oregon, "purposely and maliciously killed," &c. The State *v.* Dodson, 4 Oregon, 64.

[6] For forms, see O'Neill *v.* Reg. 6 Cox C. C. 495, 496; Whelan *v.* Reg. supra; People *v.* Murphy, 39 Cal. 52; People *v.* Alviso, 55 Cal. 230; Sneed *v.* People, 38 Mich. 248; Necomb *v.* The State, 37 Missis. 383.

said X then and there feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace, &c.[1]

Or, under a different statute, —

That before the finding of this indictment, A, &c. unlawfully and with malice aforethought killed X by shooting him with a pistol [*or*, &c. mentioning, in the like short way, whatever other method of killing was resorted to]; against the peace, &c.[2]

§ 544. **Other like Forms,** — good in the particular States, are given in the reports.[3]

§ 545. **Less Radical Modifications** — than the foregoing, not allowable under the common-law rules, are open to the pleader, should he prefer them, under the statutes of a small number of our States. They have few, if any, practical advantages over the common-law forms. It is needless to pursue the question further here;[4] except as to —

§ 546. **Murder of First Degree.** — In another connection[5] it is explained how, by considerable numbers of our courts, not all of them, various statutes have been interpreted as permitting a conviction of murder in the first degree on an indictment which sets out the elements of murder in the second degree only, and how such a statute so interpreted violates guaranties in the constitutions of all our States. There is not in the pages of our many thousand law books, another so startling illustration of the effects of the excellent rule of *stare decisis* when, after a judicial blunder, the courts shut their eyes and refuse to look however importuned, and follow it blind.[6] It would be useless to repeat

[1] Brandt *v.* Commonwealth, 13 Norris, Pa. 290; Turner *v.* Commonwealth, 5 Norris, Pa. 54; Campbell *v.* Commonwealth, 3 Norris, Pa. 187. I have omitted from this form, as it stands in the reports, some of the hoary redundancies. It is marvellous how, even in spite of legislation, pleaders will stick to what is senseless; such matter is vastly harder to get rid of in actual practice than the sensible and useful. In The State *v.* Smith, 67 Maine, 328, this form, which was deemed good, had only the "force and arms" superfluity.

[2] Beasley *v.* The State, 50 Ala. 149; Noles *v.* The State, 24 Ala. 672, 688; Ezell *v.* The State, 54 Ala. 165, 166; Young *v.* The State, 58 Ala. 379.

[3] Kansas, The State *v.* Bowen, 16 Kan. 475, 476; Tennessee, Womack *v.* The State, 7 Coldw. 508, 510; Texas, Dwyer *v.* The State, 12 Texas Ap. 535, 539.

[4] Crim. Proced. II. § 539. For forms, &c. see White *v.* Commonwealth, 9 Bush, 178; Haney *v.* The State, 34 Ark. 263; Dixon *v.* The State, 29 Ark. 165, 167; The State *v.* Moran, 7 Iowa, 236.

[5] Crim. Proced. II. § 561–589.

[6] The correct forms for the indictment are given in the last sub-title. Looking now only at the ordinary case: while there was no distinction between murder and manslaughter, the killing was alleged to have been done by the defendant "feloniously;" when this felony was divided into the two degrees of murder and man-

here what is said in the other place. In practice, even in States where the judicial blunder prevails, prosecuting officers often —

slaughter, murder was by the common-law rules of the indictment required to be charged by incorporating into the allegations its distinguishing element, namely, as done "feloniously and of *malice aforethought*;" and, when murder — that is, "felonious killing of *malice aforethought*" — was divided into the two degrees called murder in the first degree and murder in the second degree, the first distinguished by the malice aforethought being therein "deliberately premeditated," the indictment for this degree was by the same rules required to charge that the defendant did it "feloniously and of his DELIBERATELY PREMEDITATED *malice aforethought*." So much is a repetition of what has gone before, but it will make the rest of this note plain to the reader. Now, according both to natural reason and to the common law, while murder is distinguished from manslaughter by being done of "malice aforethought," no indictment can charge murder except by these words or their equivalent. Equally certain is it, that, while murder of the first degree is distinguished from murder of the second degree by being done of "deliberately premeditated" malice aforethought, no indictment without the words "deliberately premeditated" or their equivalent charges murder in the first degree. Suppose we take up here and echo and reecho the language with which certain of the decisions abound, that "the two degrees of murder are one crime," still, without the words "deliberately premeditated" the aggravated *degree* of the "one crime" is not charged. Where the government seeks to hang the prisoner because he committed, not the "one crime," but the particular branch of it which is in the first *degree*, how can it do this without alleging the fact which constitutes the "one crime" of this *degree*? The court will not permit the hanging unless the *verdict* declares the crime to be in this *degree*. But every lawyer knows that, alike in law and reason, a verdict cannot be broader than the allegations. And no lawyer will deny that a verdict which is broader violates, in a criminal case, guaranties written in all our Constitutions. "True," say some of the judges, "but it has been *decided* that you can convict one of murder in the first degree on an indictment silent as to the matter distinguishing this degree; hence it *logically follows* that an indictment wherein no one of the elements of this degree is visible, does nevertheless in some occult way aver all those elements; if the eyes of the flesh do not discern them, still the eyes of the law do; else the former adjudications would have been impossible. For certainly nothing transpired which could not; and, in the law, what was, is, and thus it must remain. *Stare decisis!*" But I need not proceed farther with this; it is all — or, rather, enough of it to create disgust where we ought to be able to entertain respect — explained in "Criminal Procedure." Referring to the explanations there, let us now imagine an exactly parallel case. One brings suit to recover two items of book account of two dollars each. At the trial, he proves an indebtedness of sixteen dollars, and has judgment for the sixteen; the attention of the court not having been directed distinctly to the fact that only four dollars were claimed. By and by another like suit is brought, and judgment for sixteen dollars is rendered on the authority of this case. Still other adjudications of the same kind inconsiderately follow; until, at length, the court is boldly confronted with the doctrine that *proofs* cannot authorize a *judgment* in excess of the *allegations*, and that to permit such a thing is equivalent to suffering parties to enter up judgments without any allegations. And the court is pressed with this objection till it speaks. But it will not entertain the idea that there has been a blunder, and that blunders do not become by repetition law. No! *Stare decisis!* After it has been decided and affirmed and reaffirmed, by learned tribunals announcing the *law*, that the sun rises at midnight, it does rise at midnight! Law is law, and the Universe rolls by law! So the court, with the drop of pity in its eye for the ignorant, reasons the question out. "This plaintiff," says the learned judge, "claims in his declaration to have sold to the defendant a hat for two dollars, and a cap for two dollars, for which he seeks to recover pay. It is not questioned that at the trial

it is believed oftener than otherwise — frame the indictment for murder in the first degree properly, as indicated in our last sub-

he duly proved so much of the case. But he was permitted, against the objection of the defendant, to prove also the sale of a coat for twelve dollars, and to have judgment for sixteen dollars. And it is said that the declaration is silent as to the coat and the twelve dollars. But the question is *res adjudicata*. In our opinion, two dollars, four dollars, and twelve dollars are all one money. And sixteen dollars are one money with the rest. But, not to enlarge so far, four dollars are admitted to be due; and a long course of decision, not to be disturbed, has settled the question that, where a plaintiff demands two dollars and two dollars, he may have judgment for sixteen dollars. Hence, on a claim of two dollars and two dollars, judgment may be for four dollars or for sixteen according as the proofs are at the trial. From which premises, as the judgment cannot exceed the allegations, it logically follows, that two dollars and two dollars include sixteen dollars; while still it is just as true that the sum of two and two is four as that it is sixteen. In fact, four and sixteen dollars are one money, and the plaintiff is to have either, according as the proofs may be at the trial. Indeed, except that the distinction both does and does not appear at the verdict, it does not arise during the progress of the cause, or until the defendant takes out his pocket book to pay the judgment. *Stare decisis!* This objection has nothing in it. Judgment for sixteen dollars." Another learned tribunal varies the reasoning; thus, "Two and two are four. So much is conceded. It is likewise plain that we have here a *four*, a *two*, *too*, another *two*, *too*, and the *two* repeated *two* times. The result is six twos, amounting to twelve, and an added four, making in all sixteen. Consequently the plaintiff may, at the hearing, prove four or sixteen as he is able, and have judgment accordingly. The two sums are one money, and are equally well charged in the declaration." On another occasion, a learned judge pronounces the unanimous opinion of the court as follows: "This great question, whether the sum of two and two is uniformly four, or is both four and sixteen with authority in the plaintiff to elect at the rendering of the verdict which on the particular occasion he will have it, has been most ably argued before us. We have been urged to use our reason upon it, but we sit here for no such purpose. The judicial function is to administer, not reason, but law. Our guide is *Stare decisis;* which, as the counsel for the plaintiff has learnedly pointed out, signifies 'Stand still, reason' On behalf of the defendant it has been made to appear, that there are decisions on his side of the question. True, but an exact count shows the others to be the more numerous. Here we are reminded that the defendant asks us to count. He says, 'Put up two fingers, then two more, and the result of counting them will be four every time, never sixteen.' But, *Stare decisis*. We must first count the decisions, to ascertain whether we are permitted to count the fingers. So, counting the decisions, we find ourselves forbidden, sitting here as judges, whatever we might do off the bench, to count the fingers. The *weight*, indeed the *great weight*, of authority compels us to stop counting, and to hold, as most confidently and unanimously we do, that the sum of two and two is both four and sixteen, and the plaintiff may have it the way he chooses when the verdict is given in. The further question remains, whether it is not also twenty; but we are happily not compelled to decide it in this case. When that question does arise, we shall meet it fairly and dispassionately, and render judgment agreeably to the analogies of this branch of our law. We shall here simply intimate as to it, that, since four dollars and sixteen dollars are one money, differing only in degrees, — the sixteen being in the first degree and the four in the second degree, — and since, as by an immense weight of authority it is held, the four dollars include the sixteen dollars, so that when you charge a man with four dollars you charge him also by force of the logic of the law with sixteen, we do not as at present advised see any ground to doubt that their sum, which is twenty dollars, may be one money also; included, the same as the sixteen, by the logic of the law in the four. At all events, whenever the question arises, we, sitting

title. Only the writing of some half-dozen additional words is required for this, and then all is plain to the defendant, to the jury, and to the trial judge. It is likewise an excellent forestalling of troubles which might arise at the verdict. And altogether it is easier, while it is simpler, in this matter as in many others, to do right than to do wrong. Another consideration, of perhaps some consequence, is, that no prosecuting officer can be absolutely sure of the prolongation of the sleep of his court. The case, he should remember, is of the exceptional class to which the rule of *stare decisis* does not apply; because the applicant for the overruling of the doctrine is the defendant who waives all claim under it,[1] and there is no individual whom such overruling can harm; while the only party to oppose is the State, that, having no interest to perpetuate what is wrong, but every interest to have the wrong corrected, must be conclusively presumed both to consent and to join in the prayer for reversal;[2] and because this is of the sort of decisions which, originating in a blunder, and overturning fundamental law and natural and constitutional right, no number of repetitions can render permanent.[3]

III. *Practical Suggestions.*

§ 547. **Useless Technicalities — (Following Beaten Path).** — The reader perceives that the indictment for felonious homicide, when drawn strictly after the common-law rules, with all the allegations which a cautious pleader will introduce in order to prevent troublesome questions at the trial, contains more useless technicalities than the common-law indictment for most other offences. Yet there is nothing about it difficult, or loudly calling for reform. The extremely short form, giving the defendant no real information and furnishing no sort of guide for the trial, authorized by statute in England and a few of our States,[4] is a heavy lurch in the other direction. On the whole, therefore,

here as supreme judges, and administering law, not reason, shall count the cases, not our fingers. Nor shall we suffer reason to beguile us from the path of duty. *Stare decisis!*" I could carry out this illustrative case to a very great length, and every supposed absurdity would be matched by a real one, substantially identical with it, in opinions of courts on this question of the allegations for murder in the first degree. But — *stare decisis!* If *Stare Decisis* has the feelings of an animal, we ought to get up a society for its protection from cruelty.

[1] Crim. Proced. I. § 117 et seq.

[2] Crim. Law, I. § 93–97.

[3] Bishop First Book, § 455–458.

[4] Ante, § 542.

there is no very urgent reason why the pleader should not, in this offence as in others, travel the beaten highway, where he can know of a certainty that every step is on solid ground, and wherein the utmost fairness to the prisoner is secured. A prosecuting officer, who wishes to obtain just verdicts of conviction, will do best to appear before the jury as being, and to be, fair and open in all his steps, and in his allegations in the indictment reasonably full yet not oppressively diffuse. He should neither seek nor seem to banish from himself the thought, which will certainly be in the consulting-room of the jury, that the question at issue is of the life or ignominious death of a fellow-being, of like feelings and aspirations with ourselves.

§ 548. **Preparation.** — Cases of this class make a special call on the counsel both for the prosecution and for the defence to prepare carefully the case in advance of the trial. Questions of expert evidence, circumstantial evidence, the competency of jurors, and some others, all requiring the most exact and cautious consideration, are particularly liable to present themselves in these capital cases. And counsel should never enter upon the trial until he has become thoroughly master of all such questions as by any possibility may arise.

CHAPTER XLIII.

HOMICIDE, ATTEMPTS BY ASSAULT AND OTHERWISE TO COMMIT.[1]

§ 549. **Elsewhere.** — The forms of the indictment for attempts, which necessarily include the attempt wrongfully to take human life, are considered in a general way in another chapter.[2] And in the chapter on "Assault and Battery" we saw how compound as well as simple assaults and assaults and batteries, the compound ones including those which are committed with intent to kill, are to be charged.[3] So that —

§ 550. **For this Chapter** — it remains only to present a few explanations, practical suggestions, and forms, and to cite places where other forms may be found.

§ 551. **Sufficient, but not ordinarily Best — (Alleging Act).** — Undoubtedly, under the common law, or any statute the terms whereof would be duly covered, it would be adequate, in analogy to the common method of charging the attempt to cheat by false pretences,[4] to aver, that, at a specified time and place, the defendant did, &c. proceeding to set out his act, as for an accomplished murder or manslaughter, in the words of any of the forms in the last chapter; but, instead of continuing to the fatal result, saying, "with intent," &c. Yet, in this attempt upon life, one need not, to be punishable, go so far as to perform all the acts necessary to complete the substantive felony if they should prove fatal; he is required only to take a step toward the fatal result, of sufficient magnitude and reaching sufficiently near it for the

[1] For the direct explanations of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 739–743; Crim. Proced. II. § 643–663. And see the title ATTEMPT in both Crim. Law and Crim. Proced. Incidental, Crim. Law, I. § 413, 441, 736, 750, 751, 756, 758, 768 *a*, 803; II. § 730; Stat. Crimes, § 225; also, many other places.

[2] Ante, § 100–112.

[3] And see particularly ante, § 206, 212, 213.

[4] Ante, § 434.

law's notice.[1] And it would be idle to allege acts neither performed in fact nor in law essential to the attempt charged. For which and other reasons, there is ordinarily a simpler way, and practically better; while yet doubtless, in special circumstances, this should be preferred.

§ 552. **Alleging Intent.** — The part of the indictment requiring more than ordinary care is the allegation of the defendant's intent. Such intent must have been in fact, and in some appropriate terms it must be charged to have been, to take life; not merely to do what, if death followed, would constitute common-law murder or manslaughter.[2] Now, a man contemplating the taking of another's life does not first lay before his mind the law's classifications of homicide, and then resolve to commit manslaughter, or common-law murder, or murder in the first degree, or murder in the second degree; but he simply determines to kill the hated person, or to kill him by means which he has devised, and elude the law altogether. Our statutes, the terms whereof must be duly covered by any indictment upon them, have such expressions as "with intent to kill," "with intent to commit manslaughter," "with intent to commit murder," "with intent to commit murder in the first degree," and the like. Now, —

§ 553. **Meaning of Statutory Terms as to Intent.** — In general, the verb "to kill," in such a connection, requires only the intent to do what would constitute, if done, either murder or manslaughter. And if the two words "kill and murder" are in the indictment, proof of an intent to commit manslaughter will satisfy the former, and of an intent to commit murder the latter; and there may be a conviction of one or both, or a conviction of the one and an acquittal of the other, upon the same count.[3] But in some connections in a statute, the words "intent to kill" may be interpreted, and they have been so in Mississippi, to signify the intent to commit murder.[4] Whereupon, —

§ 554. **What Intent in Fact is within Statute.** — If one, meaning to deprive another of life, adopts measures which, should they

[1] Crim. Law, I. § 728, 768 *a*.
[2] Ib. § 729, 730, 736; II. § 741.
[3] The State *v.* Butman, 42 N. H. 490; Hall *v.* The State, 9 Fla. 203; The State *v.* Reed, 40 Vt. 603. And see The State *v.* Calligan, 17 N. H. 253.
[4] Morman *v.* The State, 24 Missis. 54; Bradley *v.* The State, 10 Sm. & M. 618; Morgan *v.* The State, 13 Sm. & M. 242; Anthony *v.* The State, 13 Sm. & M. 263.

succeed, would render the killing murder, he becomes, on his measures failing, guilty of what the statutes term an "attempt to commit murder;" or, if the consummated offence would have been manslaughter, guilty of an "attempt to commit manslaughter;" and so of all the rest. When thus he has resolved to kill, the grade of his attempt will be what the killing would have been had he succeeded.[1] And —

§ 555. **Form of alleging Intent.** — The common and prudent method of alleging this intent, not inquiring whether any other is permissible, is after its legal effect in distinction from its outward form;[2] as, "with intent to kill the said X,"[3] or, "with intent to murder the said X,"[4] or "with intent to kill and murder the said X,"[5] or "with intent feloniously and of his malice aforethought to kill and murder the said X,"[6] or, "with intent feloniously and of his malice aforethought to commit murder in the first degree."[7]

§ 556. **Joining Intents.** — Where the statutes have indicated as within their penalties several distinguishable intents, like those just explained, and the pleader is uncertain which one of them will be proved at the trial, he may in general, within principles already stated,[8] join in allegation, in a single count, any number of intents, connecting them by the conjunction "and," and have a verdict for the highest or a lower one, or a general verdict, as the jury may deem the fact to have been. And this is so even under a statute in such words as "to kill *or* do other bodily injury," where an intent short of taking life is introduced.[9] But where different statutes have created different crimes out of the

[1] Crim. Law, II. § 740–742.

[2] Crim. Proced. I. § 332–334.

[3] The State *v.* Greenhalgh, 24 Misso. 373; The State *v.* Chandler, 24 Misso. 371.

[4] People *v.* Pettit, 3 Johns. 511; Payne *v.* The State, 5 Texas Ap. 35; Montgomery *v.* The State, 4 Texas Ap. 140.

[5] The State *v.* Painter, 67 Misso. 84; The State *v.* Newberry, 26 Iowa, 467.

[6] Commonwealth *v.* Galavan, 9 Allen, 271; Commonwealth *v.* Nutter, 8 Grat. 699; Nixon *v.* People, 2 Scam. 267; McCoy *v.* The State, 3 Eng. 451; Robinson *v.* The State, 5 Pike, 659.

[7] The State *v.* Saylor, 6 Lea, 586.

[8] Ante, § 18–21, 254, 457, 460, 535.

[9] Ante, § 553; Beckwith *v.* People, 26 Ill. 500; Baccigalupo *v.* Commonwealth, 33 Grat. 807; Murphy *v.* Commonwealth, 23 Grat. 960; Crookham *v.* The State, 5 W. Va. 510; The State *v.* Danforth, 3 Conn. 112. **Verdict for Assault.** — Of course, also, the verdict may be for a simple assault, if no more is proved and the indictment alleges it; unless the aggravated offence is by statute a felony, and the simple assault is a misdemeanor, and the common-law rule applicable to such a case has not been altered by statute, as it has in many of our States. Commonwealth *v.* Lang, 10 Gray, 11; The State *v.* Shepard, 10 Iowa, 126; Boyd *v.* The State, 4 Minn. 321; Strawn *v.* The State, 14 Ark. 549; Warrock *v.* The State, 9 Fla. 404.

same act, depending on similar yet not identical intents, and the indictment charges the intent of one of the statutes only, there cannot be a conviction on the other statute upon proof of its analogous intent which is not charged.[1] Then how, in a case of this sort, would it be if the indictment set out the one act common to the two statutes, and charged both intents, coupled by "and"? There are *dicta* and perhaps adjudications almost or quite to the point that such an indictment would be bad for *duplicity*.[2] But certainly it is not double. An act, not merely an intent, is essential to every offence.[3] Consequently in reason, and equally on authority,[4] it is not duplicity in an indictment for attempt to charge one act as committed with two or more intents. Nor does the existence, in fact, of needless intents, impair the efficacy of the needful ones;[5] therefore the allegation of the former in the indictment will not harm it. If, then, distinct statutes make punishable a particular act differently when done with this intent, or that intent, or still another, which they severally specify, an indictment is not double, nor is it objectionably repugnant, if it charges that A did the act with all the intents conjunctively coupled. Indeed, the single fact might be so, and yet the complication of intents in the doer would furnish no ground for his escape. The only objection, therefore, to an indictment setting out this entire single fact, is the possible uncertainty upon which one of several statutes the indictment is drawn.[6] The mere language of some of the cases would seem to give validity to this objection, and perhaps some of the courts will sustain it. But the author submits, that the law in its reasons and common practice is against the objection. The indictment is to be deemed on the statute inflicting the heaviest penalty. If the intent of that statute is not proved at the trial, then it drops to the statute inflicting the heaviest penalty for what is proved. Nor is there anything unusual or inconvenient in this. If one section of a statute provides a punishment for a simple felonious killing, and another for the felonious killing when done of malice aforethought, the indictment may be still, as at common law, for murder, and the verdict for manslaughter; so that the defendant is not convicted under the statutory

[1] Morman *v.* The State, 24 Missis. 54.
[2] Dawson *v.* People, 25 N. Y. 399; Pontius *v.* People, 82 N. Y. 339.
[3] Crim. Law, I. § 204, 206.
[4] Crim. Proced. I. § 437.
[5] Crim. Law, I. § 337–339.
[6] Crim. Proced. I. § 612.

provision on which he is indicted. And all this is inherently just.

§ 557. **Forms of Indictment** — for this attempt are, in considerable numbers, given in "Criminal Procedure."[1] These, in connection with what can be found at the places referred to in the opening section of this chapter, might probably be deemed sufficient for the pleader. Yet something more will be convenient.

§ 558. **General Formula and Forms.** — A general formula, comprehending forms for the indictment which, when on a statute, should be modified to cover the statutory terms, may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80] did [feloniously[2]], with a club [*or*, gun loaded with gunpowder and a leaden ball, *or*, &c. following the statute and the special fact], being a dangerous weapon,[3] which he then and there had and held,[4] make an assault on one X,[5] and him the said X with the said club did [feloniously] beat and bruise [*or*, at and against the said X (feloniously) discharge the said loaded gun, thereby and by force of the ball from the same grievously wounding the said X],[6] [*or*, administer, &c. poison, as at ante, § 213, 533]; with intent then and there feloniously and of his malice aforethought to kill and murder[7] the said X [*or*, &c. setting out the intent or intents in the statutory terms, and as directed ante, § 552–556]; against the peace, &c. [ante, § 66–69].[8]

[1] Crim. Proced. II. § 645, 651–655.

[2] The attempt is in some of the States a statutory felony, but at common law it is misdemeanor. Crim. Law, II. § 743.

[3] Ante, § 212, note.

[4] Crim. Proced. II. § 656; ante, § 520, note.

[5] Compare with ante, § 206 and 212, where also the form is sufficient.

[6] None of this setting out of a battery is necessary under a statute making the offence consist of assault, not assault and battery, with a dangerous weapon with intent, &c. Ante, § 212; Crim. Proced. II. § 658; The State *v.* Painter, 67 Misso. 84; Harrison *v.* The State, 2 Coldw. 232.

[7] Without authorities to guide me, I should say, on principle, that, while this expression charges the intent to commit murder, if the proof shows it to have been to commit manslaughter the words "malice aforethought" and "murder" may be rejected as surplusage, and the allegation so reduced will sustain a verdict of attempt to commit manslaughter. And see ante, § 555, 556.

[8] For forms see ante, § 110–112, 200 et seq.; Crim. Proced. II. § 645, 651–655; Archb. Crim. Pl. & Ev. 19th ed. 706–713; 3 Chit. Crim. Law, 791, 795–797, 828, 829, 1096; 6 Cox C. C. App. 108, 109, 117; Reg. *v.* Giles, 7 Howell St. Tr. 1130; Rex *v.* Goodman, stated 13 Howell St. Tr. 359; Rex *v.* Towle, Russ. & Ry. 314; Rex *v.* Ford, Russ. & Ry. 329; Rex *v.* Voke, Russ. & Ry. 531; Rex *v.* Withers, 1 Moody, 294; Reg. *v.* Most, 7 Q. B. D. 244, 14 Cox C. C. 583, 585; Reg. *v.* Dilworth, 2 Moody & R. 531; Sinclair's Case, 2 Lewin, 49; Elmsly's Case, 2 Lewin, 126; Reg. *v.* Lewis, 9 Car. & P. 523; Reg. *v.* Pearce, 9 Car. & P. 667; Reg. *v.* March, 1 Car. & K. 496; Shea *v.* Reg. 3 Cox C. C. 141; Reg. *v.* Brady, Jebb, 257; Reg. *v.* McEvoy, 20 U. C. Q. B. 344.

Alabama. — Shaw *v.* The State, 18 Ala. 547; Wood *v.* The State, 50 Ala. 144; Meredith *v.* The State, 60 Ala. 441.

Arkansas. — Robinson *v.* The State, 5 Pike, 659; McCoy *v.* The State, 3 Eng. 451; Cole *v.* The State, 5 Eng. 318; Milan *v.* The State, 24 Ark. 346, 348; Lacefield

§ 559. **Other Forms.** — Considering the forms given in the other places in this volume already referred to, and in "Criminal

v. The State, 34 Ark. 275; Butler *v.* The State, 34 Ark. 480.

California. — People *v.* English, 30 Cal. 214; People *v.* Swenson, 49 Cal. 388; People *v.* Alihez, 49 Cal. 452.

Connecticut. — The State *v.* Danforth, 3 Conn. 112; The State *v.* Nichols, 8 Conn. 496.

Florida. — Warrock *v.* The State, 9 Fla. 404; Sumpter *v.* The State, 11 Fla. 247; Sherman *v.* The State, 17 Fla. 888.

Georgia. — The State *v.* Howell, 1 Ga. Decis. 158; Monday *v.* The State, 32 Ga. 672; Jones *v.* The State, 37 Ga. 51; Prior *v.* The State, 41 Ga. 155; Bard *v.* The State, 55 Ga. 319; Plain *v.* The State, 60 Ga. 284.

Illinois. — Curtis *v.* People, Breese, 197; Curtis *v.* People, 1 Scam. 285; Nixon *v.* People, 2 Scam. 267; Beckwith *v.* People, 26 Ill. 500; Hanrahan *v.* People, 91 Ill. 142, 144.

Iowa. — The State *v.* Graham, 51 Iowa, 72.

Kansas. — Millar *v.* The State, 2 Kan. 174; The State *v.* Finley, 6 Kan. 366; The State *v.* White, 14 Kan. 538; The State *v.* Bybee, 17 Kan. 462; The State *v.* Miller, 25 Kan. 699; The State *v.* Beverlin, 30 Kan. 611.

Kentucky. — Commonwealth *v.* Patrick, 80 Ky. 605, 606.

Louisiana. — The State *v.* Green, 7 La. An. 518; The State *v.* Munco, 12 La. An. 625; The State *v.* Thomas, 29 La. An. 601; The State *v.* Bradford, 33 La. An. 921.

Maryland. — The State *v.* Dent, 3 Gill & J. 8.

Massachusetts. — Commonwealth *v.* Creed, 8 Gray, 387; Commonwealth *v.* Lang, 10 Gray, 11; Commonwealth *v.* Galavan, 9 Allen, 271; Commonwealth *v.* Bearse, 108 Mass. 487.

Michigan. — Rice *v.* People, 15 Mich. 9, 15; Hanna *v.* People, 19 Mich. 316.

Mississippi. — Ainsworth *v.* The State, 5 How. Missis. 242; Jones *v.* The State, 11 Sm. & M. 315; Morgan *v.* The State, 13 Sm. & M. 242; Brantley *v.* The State, 13 Sm. & M. 468; Sarah *v.* The State, 28 Missis. 267; Williams *v.* The State, 42 Missis. 328.

Missouri. — The State *v.* Comfort, 5 Misso. 357; The State *v.* Jordan, 19 Misso. 212; The State *v.* Chandler, 24 Misso. 371; The State *v.* Greenhalgh, 24 Misso. 373; The State *v.* Dalton, 27 Misso. 13; The State *v.* Chumley, 67 Misso. 41, 43; The State *v.* Painter, 67 Misso. 84; The State *v.* Harper, 69 Misso. 425; The State *v.* Van Zant, 71 Misso. 541; The State *v.* Webster, 77 Misso. 566.

Nevada. — The State *v.* O'Flaherty, 7 Nev. 153, 157; The State *v.* Roderigas, 7 Nev. 328, 330; The State *v.* Rohey, 8 Nev. 312.

New Hampshire. — The State *v.* Calligan, 17 N. H. 253.

New Jersey. — The State *v.* Mairs, Coxe, 453.

New York. — People *v.* Pettit, 3 Johns. 511; Dawson *v.* People, 25 N. Y. 399; Pontius *v.* People, 82 N. Y. 339; Lenahan *v.* People, 5 Thomp. & C. 265; People *v.* Davis, 4 Parker C. C. 61; O'Leary *v.* People, 4 Parker C. C. 187; Nelson *v.* People, 5 Parker C. C. 39; La Beau *v.* People, 6 Parker C. C. 371.

North Carolina. — The State *v.* Yarborough, 77 N. C. 524; The State *v.* Hinson, 82 N. C. 597.

Oregon. — The State *v.* Doty, 5 Oregon, 491.

Pennsylvania. — Hunter *v.* Commonwealth, 29 Smith, Pa. 503; Stabler *v.* Commonwealth, 14 Norris, Pa. 318.

Tennessee. — Evans *v.* The State, 1 Humph. 394; The State *v.* McCarn, 11 Humph. 494; Harrison *v.* The State, 2 Coldw. 232; Logan *v.* The State, 2 Lea, 222; The State *v.* Saylor, 6 Lea, 586.

Texas. — The State *v.* Rutherford, 13 Texas, 24; The State *v.* Davis, 26 Texas, 201; The State *v.* Nations, 31 Texas, 561; The State *v.* Killough, 32 Texas, 74; Bittick *v.* The State, 40 Texas, 117; The State *v.* Walker, 40 Texas, 485; Mayfield *v.* The State, 44 Texas, 59; Green *v.* The State, 1 Texas Ap. 82; Browning *v.* The State, 1 Texas Ap. 96; Johnson *v.* The State, 1 Texas Ap. 130; Montgomery *v.* The State, 4 Texas Ap. 140; Payne *v.* The State, 5 Texas Ap. 35; Poston *v.* The State, 12 Texas Ap. 408.

Virginia. — Commonwealth *v.* Nutter,

Procedure," it seems superfluous to add anything further. And, though the author at one time proposed to himself a further extension of this chapter, and though possibly some who possess the book might desire it, he has determined to do what he is confident is best for the reader, by reserving the remainder of his space for other topics.

8 Grat. 699 ; Murphy *v.* Commonwealth, 23 Grat. 960 ; Randall *v.* Commonwealth, 24 Grat. 644 ; Hoback *v.* Commonwealth, 28 Grat. 922 ; Baccigalupo *v.* Commonwealth, 33 Grat. 807.

West Virginia. — Crookham *v.* The State, 5 W. Va. 510, 511 ; The State *v.* Yates, 21 W. Va. 761, 762.

Wisconsin. — Haney *v.* The State, 5 Wis. 529 ; Kilkelly *v.* The State, 43 Wis. 604 ; Sullivan *v.* The State, 44 Wis. 595.

For HOTEL KEEPER, see INNKEEPER.

CHAPTER XLIV.

HORSE-RACING AND FURIOUS DRIVING.[1]

§ 560. **At Common Law.** — For the common-law offence[2] the following form is good in Tennessee, but we have not decisions upon it in the other States: —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did wilfully and unlawfully run and race a horse, which he was then riding, along a public road of the county of, &c.[3] greatly to the danger and inconvenience of all persons travelling along said road; against the peace, &c. [ante, § 65–69].[4]

§ 561. **Horse-racing contrary to Statute.** — Under a statute making punishable one "who shall knowingly suffer his horse, mare, or gelding to be run in what is commonly called a horse-race, along a public highway,"[5] the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully and knowingly suffer his horse to be run in a certain race, commonly called a horse-race, in and along a certain public highway there, called M Street[6] [*or*, leading from N to O]; against the peace, &c.[7]

§ 562. **Furious Driving.** — Under a provision to punish one who, "riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger," it appears to be adequate to say, —

That A, &c. on, &c. at, &c. did ride a horse furiously on a certain highway there, leading from N to O, so as then and there to endanger the lives and limbs of passengers on the said highway; against the peace, &c.[8]

[1] See Stat. Crimes, § 927–930; Crim. Law, I. § 540; Stat. Crimes, § 20, 852, 862, 872, 873, 1112.

[2] Crim. Law, I. § 540.

[3] I should prefer the expression "along a public highway there." And see Stat. Crimes, § 927. Possibly adding the name of the street. Crim. Proced. II. § 1051.

[4] The State *v.* Battery, 6 Baxter, 545. And see the title NUISANCE.

[5] Watson *v.* The State, 3 Ind. 123.

[6] See ante, § 560, note.

[7] Bicknell Crim. Pr. 430, slightly modified. And see Stat. Crimes, § 927–928 *a*. For another form, see Phillips *v.* The State, 35 Ark. 384.

[8] Williams *v.* Evans, 1 Ex. D. 277. For driving an engine incautiously, 10 Cox C. C. App. 40.

CHAPTER XLV.

INCEST.[1]

§ 563. **Indictment in General — (Analogies — How framed).** — There are two sorts of incest. The one consists of sexual commerce, either with or without the formality of a void marriage, between persons too nearly related in consanguinity or affinity to marry.[2] The indictment for this sort avers the relationship, and is otherwise the same as for fornication or adultery.[3] The other sort consists simply of a formal marriage between parties thus related and forbidden.[4] For this the indictment is similar to that for polygamy; but, instead of alleging a prior and subsisting marriage of one or both of the parties, it sets out the disqualifying relationship.[5] And, in either case, being, as it always is, on a statute, it is made to cover the statutory expression.[6]

§ 564. **Formula and Forms.** — The order of the averments will follow the pleader's convenience. Subject to be varied with the statutory terms, they may be, for example, —

That A, &c. [ante, § 74–77] and [if the pleader chooses to proceed against both parties in one indictment[7]] B, &c. on, &c. at, &c. [ante, § 80], being and knowing[8] themselves to be persons forbidden to intermarry[9]

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Stat. Crimes, § 726–736. Incidental, Crim. Law, I. § 502, 764, 768 *d*, 795; Stat. Crimes, § 660, 661, 681, note. And compare with the title ADULTERY, &c. ante, § 147 et seq.; and POLYGAMY, post.

[2] Stat. Crimes, § 727.

[3] Consult the chapter beginning ante, § 147.

[4] Stat. Crimes, § 728.

[5] And see Stat. Crimes, § 731.

[6] Stat. Crimes, § 731–733.

[7] Ante, § 150. And see Stat. Crimes, § 733; Baumer *v.* The State, 49 Ind. 544.

[8] The averment of knowledge of the relationship is necessary only when the interpreted (ante, § 32) statute makes such knowledge an affirmative element in the offence. Stat. Crimes, § 729, 732, 733; Crim. Proced. I. § 522.

[9] The pleader will often find it promotive of perspicuity to insert such words as "forbidden to intermarry;" but, since they merely announce a conclusion of law, they are plainly enough unnecessary. Ante, § 494, 496, and the places there referred to. Whether they are employed or not, the relationship must, in principle, be particularized. Crim. Proced. I. § 566–584; Stat. Crimes, § 732.

by reason that the said A was the father of the said B [1] [*or*, &c. setting out the relationship, whatever it is, according to the fact], did then and there unlawfully, [feloniously [2]], and incestuously have carnal knowledge each of the body of the other [*or*, commit incestuous fornication, &c. *or*, live together in incestuous fornication, &c.; [3] *or*, if the incest is of the other sort, intermarry with and take each other as and for husband and wife]; against the peace, &c. [ante, § 65–69].[4]

§ 565. **Other Forms.** — This formula is sufficient, especially when considered in connection with the chapters on "Adultery," &c. and on "Polygamy," to supply the pleader with all needed forms. To add others would be only to misuse the space they occupied.

§ 566. **Practical Suggestions.** — Commonly, with us, incest is simply a particular kind of fornication or adultery. Therefore the practitioner should consult, as within the present head, some "practical suggestions" already given.[5]

[1] Or, more briefly, as in Stat. Crimes, § 732.

[2] To be employed only where the offence is felony.

[3] Following any of the appropriate expressions explained in the chapter beginning ante, § 147.

[4] For precedents see —

Alabama. — Morgan *v.* The State, 11 Ala. 289; Baker *v.* The State, 30 Ala. 521.

Georgia. — Cook *v.* The State, 11 Ga. 53.

Indiana. — Williams *v.* The State, 2 Ind. 439; Baumer *v.* The State, 49 Ind. 544.

Michigan. — People *v.* Rouse, 2 Mich. N. P. 209.

Mississippi. — Chancellor *v.* The State, 47 Missis. 278.

Tennessee. — Ewell *v.* The State, 6 Yerg. 364.

Texas. — Freeman *v.* The State, 11 Texas Ap. 92; Compton *v.* The State, 13 Texas Ap. 271, 273; McGrew *v.* The State, 13 Texas Ap. 340, 342.

Virginia. — Hutchins *v.* Commonwealth, 2 Va. Cas. 331, 332.

[5] Ante, § 161, 162.

For INCITING TO CRIME, see ante, § 105–107, 114–117, 119–121.
INDECENCY, see NUISANCE.

CHAPTER XLVI.

INNKEEPER REFUSING GUEST.[1]

§ 567. **Indictment.** — The requirements of the indictment for this infrequent common-law offence are not with any great minuteness settled by authority. But the following form, which perhaps admits of some condensation, appears to be adequate: —

That A, &c. on, &c. at, &c. was a [duly licensed [2]] innkeeper, and did then and there keep a common inn, with rooms, beds, victuals, and other accommodations for all travellers, and attached to and parcel of the said inn were stables supplied with fodder, grain, and other necessary things for all horses of travellers; whereupon one X, being then and there a traveller, and having with him for the purposes of his travelling a horse, did then and there at the said inn apply to the said A to be received therein as a guest, and for food and lodging for himself and food and stabling for his said horse, for a reasonable time and during the then approaching night, being then and there ready and willing to pay for the same, and offering and tendering to the said A proper and reasonable pay therefor; but then and there the said A, having sufficient unoccupied room and other means in his said inn and stables, unlawfully, unreasonably, and without justifying excuse, refused to receive the said X as a guest in said inn, and would not and did not provide the said X with food, lodging, stabling, or with any other needed accommodation for himself and horse; against the peace, &c.[3]

[1] For the law of this offence, see Crim. Law, I. § 532.

[2] Perhaps, under the laws of some of the States, an averment of license may be important. It is not in the English form before me, which was treated as good.

[3] For precedents, see Rex *v.* Ivens, 7 Car. & P. 213; Whart. Prec. No. 912. I am not aware that the books contain any other precedents.

For INSOLVENCY, see ante, § 230 et seq.
INSTIGATION, see ante, § 105–107, 114–117, 119–121.
INTOXICATING LIQUORS, see LIQUOR SELLING, &c.
INTOXICATION, see DRUNKENNESS.

CHAPTER XLVII.

KIDNAPPING AND FALSE IMPRISONMENT.[1]

§ 568. **How in this Chapter.** — These offences being nearly related, with no distinct partition between them, and in a general way kidnapping being a sort of aggravated false imprisonment, so that an indictment for the heavier includes, or may be so drawn as to include, the lighter,[2] it would be inconvenient, with no compensating advantages, to separate them in this chapter.

§ 569. **Formula for Indictment.** — The indictment, which, as in all other offences, must be varied with the statutory terms, if any, to be covered, may allege, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did make an assault on one X, and him the said X did then and there beat and bruise, and, without any authority or[3] lawful excuse, detain, restrain, and falsely imprison[4] [proceeding to allege aggravations according to the fact, as] for the space of ten hours thence next following[5] [*or*, and did then and there thrust the said X into a certain loathsome dungeon and prison, and thence continually did keep and detain him in great suffering imprisoned therein

[1] For the direct expositions of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 746–756; Crim. Proced. II. § 365–368, 688–695. Incidental, Crim. Law, I. § 306, 553, 686, 868; II. § 26, 56; Crim. Proced. I. § 438, note, 1338; Stat. Crimes, § 205, 209, 232, 236, 619.

[2] Crim. Law, II. § 746, 750; Crim. Proced. II. § 688, 691.

[3] "Or," the right conjunction in negative averments. Ante, § 514, note, and places there cited.

[4] Thus far, in fewer words than in most of the precedents, yet with the omission of nothing which any pleader would deem important, a simple false imprisonment, including a battery and an assault, is believed to be adequately charged. From this point the indictment proceeds with the aggravations special to the case. Crim. Proced. II. § 691. There is no defined limit to the sorts of aggravation admissible, and they may extend in gravity into the most reprehensible forms of kidnapping. But it is neither legally necessary, nor of much practical advantage, to allege aggravations which do not as of law enhance the punishment. Those which do enhance it must be charged, or the higher punishment cannot be inflicted. Ante, § 203.

[5] Crim. Proced. II. § 365. Add here, if so are the facts, "and until the said X would and did deliver and pay to the said A one hundred dollars [*or*, &c. according to the fact] which he the said A then and there demanded of the said X."

for the space of one hundred days and until, &c.], with the intent that the said X should be unlawfully and against his will carried and conveyed away out of and beyond the limits of the State to some place to the jurors unknown, to be in such foreign place held in slavery [*or*, and did then and there kidnap and transport him the said X, unlawfully and against his will, out of and beyond the county aforesaid, and out of and beyond the State, &c. *or*, &c. alleging any other special fact]; against the peace, &c. [ante, § 65–69].[1]

§ 570. **Statute and Forms.** — On a statute making punishable one "who, without lawful authority, shall forcibly or secretly confine or imprison any other person within this State against his will, or shall forcibly carry or send such person out of this State, or shall forcibly seize and confine or shall inveigle or kidnap any other person with intent to cause such person to be secretly confined or imprisoned in this State against his will, or to be sold as a slave," &c. the allegations may be, —

That A, &c. on, &c. at, &c. did make an assault upon one X [*or*, upon one X the minor child of one Y], and him the said X did then and there beat, bruise,[2] and, against the will of him the said X [and of the said Y his father], and without lawful authority therefor, forcibly confine and imprison there [*or*, forcibly bind with ropes and cords and thereby forcibly confine and imprison there] for the continuous space of three hours and more [*or*, and did then and there forcibly seize, confine, and kidnap the said X with intent to cause him to be secretly and against his will (and against the will of the said Y his father) confined and imprisoned in this State]; against the peace, &c.[3]

§ 571. **Importing Kidnapped Person.** — A statute of the United

[1] For precedents, see Crim. Proced. II. § 365, 366, 690; 3 Chit. Crim. Law, 835–841; 6 Went. Pl. 392; 6 Cox C. C. App. 25; Rex *v.* Allen, Trem. P. C. 216; Rex *v.* Bayly, Trem. P. C. 216; Cornwall *v.* Reg. 33 U. C. Q. B. 106.

Florida. — Barber *v.* The State, 13 Fla. 675; Ross *v.* The State, 15 Fla. 55, 58.

Illinois. — Moody *v.* People, 20 Ill. 315.

Indiana. — The State *v.* McRoberts, 4 Blackf. 178.

Iowa. — United States *v.* Lapoint, Morris, 146.

Massachusetts. — Commonwealth *v.* Turner, 3 Met. 19; Commonwealth *v.* Blodgett, 12 Met. 56.

Missouri. — Kirk *v.* The State, 6 Misso. 469.

New Hampshire. — The State *v.* Rollins, 8 N. H. 550.

New York. — People *v.* Merrill, 2 Parker C. C. 590.

Oregon. — The State *v.* Moy Looke, 7 Oregon, 54.

Texas. — Click *v.* The State, 3 Texas, 282.

United States. — United States *v.* Henning, 4 Cranch C. C. 645; United States *v.* Aucarola, 17 Blatch. 423, 424.

[2] While probably the allegation neither of assault nor of battery is legally necessary, both are practically best, as explained Crim. Proced. II. § 365, 366, 690–692.

[3] For precedents, followed in part in the above, see Commonwealth *v.* Blodgett, 12 Met. 56; Commonwealth *v.* Turner, 3 Met. 19.

States makes one a felon who "shall knowingly and wilfully bring into the United States, or the territories thereof, any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement or to any involuntary service," or "shall knowingly and wilfully sell, or cause to be sold, into any condition of involuntary servitude, any other person, for any term whatever," or "shall knowingly and wilfully hold to involuntary service any person so sold and bought."[1] And a count on the clause against importing was held to be good which alleged, —

That A, &c. on, &c. at, &c. did unlawfully, feloniously, knowingly, and wilfully bring into the United States, to wit, into the city and county of New York, in the State of New York, one X, a person who had theretofore been inveigled in the kingdom of Italy, with intent to hold said X in confinement, and to an involuntary service of begging and playing on musical instruments; against the peace, &c.[2]

§ 572. **Holding, &c.** — Under another clause of this statute it was deemed good to aver, —

That A, &c. on, &c. at, &c. unlawfully, feloniously, knowingly, and wilfully held to an involuntary service of begging and of playing on musical instruments, one X, a person who had theretofore been unlawfully and knowingly sold by certain persons to the jurors unknown, into a condition of involuntary servitude, for a term of four years and six months, and had been theretofore by the said A bought for the service and servitude aforesaid, and for the term aforesaid, of the persons aforesaid; against the peace, &c.[3]

[1] Act of June 23, 1874 (c. 464), § 1.

[2] United States *v.* Aucarola, 17 Blatch. 423, 424.

[3] The fourth count in United States *v.* Aucarola, 17 Blatch. 423, as above.

CHAPTER XLVIII.

LABOR OFFENCES.[1]

§ 573. **In this Chapter** — will be grouped the principal ones of the few offences we have against labor.

§ 574. **Conspiracies against Labor** — are considered under the title Conspiracy.[2]

§ 575. **Slavery.** — There were offences connected with slavery, now passed away with the institution itself.[3]

§ 576. **Enticing or hiring away one under Contract.** — We have statutes in various terms making it punishable for a person to hire or otherwise entice away another's servant or laborer under contract, while the agreed term is unexpired.[4] On a point not made quite clear by the cases, it is reasonably plain that, if the offence may be completed by a mere enticement, it is committed the same where the servant is an infant as where he is an adult; because the contract of service is not void but voidable, and a third person cannot avoid it. But if the minor disaffirms it before the enticer has proceeded far enough to be fully within the inhibition, there can be no offence afterward.[5]

§ 577. **Indictment.** — The indictment must cover the terms of the particular statute; and, as they differ in our States, it will not be the same in all. Under the branch of the Georgia provision which makes it an offence "if any person, by himself or agent, shall be guilty of employing the servant of another, during the term for which he, she, or they may be employed, knowing

[1] See Crim. Law, I. § 453–455, 508.

[2] Ante, § 298, 301–308.

[3] Perhaps it may occasionally be convenient to refer to the old precedents for analogous offences; as, for concealing, harboring, and enticing away slaves, The State *v.* Duncan, 9 Port. 260; The State *v.* Cadle, 19 Ark. 613; The State *v.* Woodly, 2 Jones, 276; Cain *v.* The State, 18 Texas, 387. Assisting slave to escape, Queen *v.* The State, 5 Har. & J. 232; Kentucky *v.* Ohio, 24 How. U. S. 66, 67. Selling slave in the night-time, The State *v.* Robbins, 9 Ire. 356.

[4] Compare with ante, § 303.

[5] Bishop Con. § 272, 275, 276; Langham *v.* The State, 55 Ala. 114; Murrell *v.* The State, 44 Ala. 367.

that such servant was so employed, and that his term of service was not expired," the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully employ [and take into his own service [1]] one X, who was then and there the servant of one Y, the same being during the term for which he the said X was by the said Y employed as such servant; the said A then and there well knowing that the said X was such servant so employed as aforesaid by the said Y, and that his term of service was not expired; against the peace, &c.[2]

§ 578. **Intimidating Laborer.** — Under a statute to punish one who "shall, by intimidation or force, prevent or seek to prevent any other person or persons from entering or continuing in the employment of any corporation, company, or individual," the allegations may be, —

That on, &c. at, &c. M was a corporation [3] having mills at, &c. aforesaid, and X was a person employed by said corporation as a spinner in said mills; whereupon A, &c. then and there unlawfully, by intimidation and by force, did seek to prevent and did prevent the said X from continuing in the employment of the said corporation; against the peace, &c.[4]

§ 579. **Hours of Labor** — for minors, women, &c. are sometimes regulated by statutes; but we shall not here enter into particular expositions of them.[5]

§ 580. **Mutiny and Revolt on Shipboard** — are offences occasionally coming into notice.[6] It will be sufficient here to refer to places where precedents for the indictment may be found.[7]

[1] Not in the form before me, yet I should deem the insertion of these words more certainly to cover in full the statutory meaning (which every indictment must do, ante, § 32), not expressing an opinion whether or not they are indispensable.

[2] See, for precedents, Bryan *v.* The State, 44 Ga. 328 (which in a measure is followed in the above form); Murrell *v.* The State, 44 Ala. 367; The State *v.* Daniel, 89 N. C. 553; Roseberry *v.* The State, 50 Ala. 160. **Indentured Servant.** — As to harboring an indentured servant, or enabling him to escape, see The State *v.* Hooper, 1 Houst. Crim. 17; The State *v.* Owens, 1 Houst. Crim. 72. **Old Forms.** — Under various former English provisions not in force with us, — for enticing artificers out of the kingdom, Rex *v.* Cox, Trem. P. C. 252; 2 Chit. Crim. Law, 542, 544. For exercising a trade, not having served an apprenticeship, 6 Went. Pl. 395. Refusing to receive apprentice, Rex *v.* Pyne, Trem. P. C. 264. Apprentice enlisting without consent of master, Rex *v.* Jones, 1 Leach, 4th ed. 174.

[3] Ante, § 79 and note.

[4] For a precedent, partly followed in the above, see Commonwealth *v.* Dyer, 128 Mass. 70.

[5] Constitutional, Commonwealth *v.* Hamilton Manuf. Co. 120 Mass. 388. Form, &c. Commonwealth *v.* Osborn Mills, 130 Mass. 33.

[6] For decisions relating thereto, see Crim. Law, I. § 564, note.

[7] United States *v.* Peterson, 1 Woodb. & M. 305; Reg. *v.* McGregor, 1 Car. & K. 429; Reg. *v.* Smith, 3 Cox C. C. 443; Reg. *v.* Jones, 11 Cox C. C. 393. **Disobeying Commands** — of officer of ship, United States *v.* McArdle, 2 Saw. 367.

CHAPTER XLIX.

LARCENY, SIMPLE AND COMPOUND.[1]

§ 581. **In General of Form of Indictment.** — The indictment for larceny, except under statutes which have changed the essential ingredients of the offence,[2] is, in the absence of any statutory aggravation, — that is, for simple larceny, — uniform in its allegations of the wrong.[3] If a statute has provided a heavier punishment for it when committed under special circumstances of time, place, or the like, the indictment should be merely enlarged by a proper averment of the particular aggravating matter, drawn on the statutory terms.[4] In the description of the property stolen, the averments will vary with the facts of the individual case. Therefore, in the expositions of this chapter, we shall not have occasion to encumber the pages with numerous repetitions of those parts of forms which are the same in all.

§ 582. **Formula for Indictment.** — The allegations may be, —

That A, &c. [ante, § 74–77], on, &c. [*add*, if the punishment is heavier when the larceny is in the night, the averment in ante, § 87, but doubtless the hour need not be stated unless the statute makes it an element in the aggravated offence[5]], [with force and arms[6]], at, &c. [ante, § 80], one silver spoon[7] of the value of three dollars, two, &c. [setting down all the

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 757–904; Crim. Proced. II. § 696–780; Stat. Crimes, § 409–429. Incidental, Crim. Law, I. § 137–142, 207, 224, 232, 260, 262, 263, 297, 320, 342, 349, 411, 426, 440, 566, 567, 578, 579, 582, 583, 585, 654, 676, 679, 680, 741, 743–745, 757, 767, 792, 795, 796, 799, 801, 811, 935, 937, 942, 974, 1052, 1055, 1061–1064, 1066; II. § 319, 320, 327–329, 365, 368, 1084, 1156; Crim. Proced. I. § 59, 60, 241, 397, 449, 480–483, 488 *b*, 488 *e*, 530, 541, 553, 573, 575, 580, 583, 590, 616, 620, 639, note, 1010, 1056–1060, 1112, 1124; II. § 74, 87–92, 142–145, 152, 185, 230, 315–319, 325, 989, 1001; Stat. Crimes, § 7, 127, 140, 205, 209, 211, note, 213, 222, 232–234, 246, 247, 248, 325–344, 454. And see EMBEZZLEMENT — ROBBERY.

[2] Stat. Crimes, § 414, 418.

[3] Crim. Proced. II. § 697.

[4] Ib. II. § 772; Stat. Crimes, § 415, 416.

[5] Crim. Proced. I. § 399; II. § 131–133.

[6] Not necessary. Ante, § 43.

[7] **Order of Avermenta.** — I am follow-

stolen articles in like manner, and giving the separate value of each [1]], of the property of [2] X [ante, § 78, 79], [then and there being found [3]], in and from the dwelling-house of the said X [4] [*or*, from the person of the said X; [5] *or*, &c. setting out, according to the fact, and in the statutory terms, any other aggravating matter which of law enhances the punishment], feloniously did steal, take, and carry away; [6] against the peace, &c. [ante, § 65–69]. [7]

ing the old order of the averments, which the pleader can change if he chooses. It is specially suited to the present use. The translations of our old common-law indictments from Latin to English (Crim. Proced. I. § 340, 341; 4 Bl. Com. 323) were literal to the extent even of preserving the Latin idiom. Hence many of the old forms have come to us constructed in ways not to be approved by any critic of English sentences. Some of them I have slightly varied in what was not material, to render them more nearly good English. Yet in this I am not without judicial precedent. I could find precedents for treating this indictment in the same way. But the old form is so convenient that many pleaders will feel justified in objecting to any change.

[1] An indictment stating simply the aggregate value of enumerated articles is not bad in law; but so many and so grave difficulties are liable to arise upon it at the trial and verdict, that the judicious pleader will not ordinarily allege the value in this way. Crim. Proced. II. § 714. As to when the allegation of value may be omitted, see Ib. § 713; Stat. Crimes, § 427.

[2] Instead of these words, "of the property of," the old and common precedents have, "of the goods and chattels of." At the common law, there could be no larceny of anything except goods and chattels; therefore the expression was always accurate and appropriate. But our statutes have made various other things the subjects of larceny. And the word "property" covers in meaning the whole, and it is held to be good for all. This part of the indictment is generally printed in the pleader's blanks (ante, § 51), and convenience requires it to be in language which will suffice for all cases. Crim. Proced. II. § 697, 699, 718, 736.

[3] Nearly universal in the precedents. It is eliminated from the late English ones. Archb. Crim. Pl. & Ev. 19th ed. 344; 6 Cox C. C. App. 1; Reg. *v.* Evans, 7 Cox C. C. 151; and from various others, The State *v.* Fenn, 41 Conn. 590; Musquez *v.* The State, 41 Texas, 226; The State *v.* Hoppe, 39 Iowa, 468; The State *v.* Taunt, 16 Minn. 109. It was long ago adjudged unnecessary. Crim. Proced. II. § 697. In just meaning, it seems to point to the idea of the thing being lost; for which and for other reasons, as well as because it occupies needless space, it is better omitted.

[4] Crim. Proced. II. § 777, 778.

[5] Ib. § 780.

[6] Hale says, "The indictment runs *vi et armis felonice furatus fuit, cepit, et asportavit*, in case of dead chattels; *cepit et abduxit*, in case of a horse; *cepit et effugavit*, in case of sheep, cows, &c.; wherein the words *felonice, furatus fuit, cepit*, are essential to the crime." 1 Hale P. C. 504. With us, and in England in the modern cases, this distinction is occasionally noted; but there can be no doubt that the form in the text is for every sort of larceny legally sufficient. Crim. Proced. II. § 698. If we assume that, in Commonwealth *v.* Adams, 7 Gray, 43, the court was right in holding the indictment ill for omitting the word "away," the expression being "steal, take, and carry," so that "carry away," or "lead away," or "drive away" is essential, still "carry away" includes in meaning the other two. One of the definitions of "carry," according to Webster, is, "to cause to go;" as, in the expression, "The king of Assyria did *carry away Israel* to Assyria." In like manner one may be said to "carry away" a horse or a sheep, when he no more bears the animal on his shoulders or in his arms than did the Assyrian king thus bear "Israel." Indeed, another of the meanings is, "to remove, lead, or drive;" as in "He *carried away* all his cattle." As this part of the form is commonly printed in our blanks, I should not recommend undergoing the inconvenience of changing it for special cases.

[7] For precedents, see 3 Chit. Crim. Law,

§ 583. **Simple — Compound.** — The reader perceives, that the allegations for a simple and for a compound larceny are the

959–988, 1098, 1118; 4 Went. Pl. 41–44; 6 Ib. 1, 2; 4 Cox C. C. App. 18; 6 Ib. App. 1–13, 16–18; Reg. *v.* Callingwood, 2 Ld. Raym. 1116; Rex *v.* Johnson, 3 M. & S. 539; Rex *v.* Somerton, 7 B. & C. 463; Campbell *v.* Reg. 11 Q. B. 799, 800; Rex *v.* Hickman, 1 Leach, 4th ed. 318; Rex *v.* Pope, 1 Leach, 4th ed. 336; Rex *v.* Goddard, 2 Leach, 4th ed. 545; Rex *v.* Graham, 2 Leach, 4th ed. 547; Rex *v.* Burnel, 2 Leach, 4th ed. 588; Rex *v.* Campbell, 2 Leach, 4th ed. 564; Rex *v.* Owen, 2 Leach, 4th ed. 572; Rex *v.* Etherington, 2 Leach, 4th ed. 671; Rex *v.* Palmer, 2 Leach, 4th ed. 680; Rex *v.* Pooley, 2 Leach, 4th ed. 900, 3 B. & P. 315; Rex *v.* Clarke, 2 Leach, 4th ed. 1036; s. c. nom. Rex *v.* Clark, Russ. & Ry. 181; Rex *v.* Walsh, 2 Leach, 4th ed. 1054; Rex *v.* Craven, Russ. & Ry. 14; Rex *v.* Pearson, 1 Moody, 313, 314; Reg. *v.* Heath, 2 Moody, 33; Reg. *v.* Jones, 1 Den. C. C. 101, 2 Car. & K. 165; Reg. *v.* Holloway, 1 Den. C. C. 370; Reg. *v.* Martin, 1 Den. C. C 398, 399, 2 Car. & K. 950, 3 Cox C. C. 447; Reg. *v.* Radley, 1 Den. C. C. 450, 2 Car. & K. 974, 3 Cox C. C. 460; Reg. *v.* Matthews, 1 Den. C. C. 596; Reg. *v.* Craddock, 2 Den. C. C. 31, 4 Cox C. C. 409; Reg. *v.* Clark, Dears. 198, 3 Car. & K. 367, 6 Cox C. C. 210; Reg. *v.* West, Dears. & B. 109, 110, note, 7 Cox C. C. 183; Reg. *v.* Gorbutt, Dears. & B. 166, 7 Cox C. C. 221; Reg. *v.* Johnson, Dears. & B. 340, 7 Cox C. C. 379; Reg. *v.* Jennings, Dears. & B. 447, 7 Cox C. C. 397; Reg. *v.* Hilton, Bell C. C. 20, 8 Cox C. C. 87; Reg. *v.* Christopher, Bell C. C. 27, 8 Cox C. C. 91; Reg. *v.* Rice, Bell C. C. 87, 8 Cox C. C. 119; Reg. *v.* Betts, Bell C. C. 90, 8 Cox C. C. 140; Reg. *v.* Huntley, Bell C. C. 238, 8 Cox C. C. 260; Reg. *v.* Hughes, Bell C. C. 242, 8 Cox C. C. 278; Reg. *v.* Loose, Bell C. C. 259, 8 Cox C. C. 302; Reg. *v.* Pierce, Bell C. C. 235, 8 Cox C. C. 344; Reg. *v.* Holman, Leigh & C. 177; Reg. *v.* Fallon, Leigh & C. 217, 9 Cox C. C. 242; Reg. *v.* Thomas, Leigh & C. 313, 9 Cox C. C. 376 (treasure-trove); Reg. *v.* Collins, Leigh & C. 471, 9 Cox C. C. 497; Reg. *v.* Johnson, Leigh & C. 489, 10 Cox C. C. 13; Reg. *v.* Lowrie, Law Rep. 1 C. C. 61, 10 Cox C. C. 388; Reg. *v.* Gregory, Law Rep. 1 C. C. 77, 10 Cox C. C. 459; Reg. *v.* Bailey, Law Rep. 1 C. C. 347, 12 Cox C. C. 129; Reg. *v.* Tatlock, 2 Q. B. D. 157, 13 Cox C. C. 328; Rex *v.* Hurrell, Ryan & Moody N. P. 296; Reg. *v.* Trevenner, 2 Moody & R. 471; Reg. *v.* Hioley, 2 Moody & R. 524; Rex *v.* John, 7 Car. & P. 324; Reg. *v.* Welham, 1 Cox C. C. 192; Campbell *v.* Reg. 1 Cox C. C. 269; Reg. *v.* Evans, 7 Cox C. C. 151; Reg. *v.* Toole, 11 Cox C. C. 75 (treasure-trove); Reg. *v.* Halford, 11 Cox C. C. 88; Reg. *v.* Henwood, 11 Cox C. C. 526; Reg. *v.* Roe, 11 Cox C. C. 554; Reg. *v.* Henderson, 11 Cox C. C. 593; Reg. *v.* Butterworth, 12 Cox C. C. 132, 2 Eng. Rep. 195; Reg. *v.* Bird, 12 Cox C. C. 257, 4 Eng. Rep. 533; Reg. *v.* Matthews, 12 Cox C. C. 489, 6 Eng. Rep. 329; Reg. *v.* Hancock, 14 Cox C. C. 119; Reg. *v.* Tonkinson, 14 Cox C. C. 603; Reg. *v.* Barran, Jebb, 245.

Alabama. — The State *v.* Seay, 3 Stew. 123; The State *v.* Greenwood, 5 Port. 474; Williams *v.* The State, 15 Ala. 259; Murray *v.* The State, 18 Ala. 727; Foster *v.* The State, 39 Ala. 229; Alsey *v.* The State, 39 Ala. 664; Sallie *v.* The State, 39 Ala. 691; Moore *v.* The State, 40 Ala. 49; Maynard *v.* The State, 46 Ala. 85; Parmer *v.* The State, 41 Ala. 416; Sheppard *v.* The State, 42 Ala. 531; Williams *v.* The State, 44 Ala. 396; Ward *v.* The State, 48 Ala. 161; Du Bois *v.* The State, 50 Ala. 139; Smith *v.* The State, 55 Ala. 59; Hunt *v.* The State, 55 Ala. 138; Stollenwerk *v.* The State, 55 Ala. 142; Grant *v.* The State, 55 Ala. 201; Bonner *v.* The State, 55 Ala. 242; Rountree *v.* The State, 58 Ala. 381; Johnson *v.* The State, 59 Ala. 37, 38; Harris *v.* The State, 60 Ala. 50; Adams *v.* The State, 60 Ala. 52; Peacher *v.* The State, 61 Ala. 22; McDowell *v.* The State, 61 Ala. 172; Lyon *v.* The State, 61 Ala. 224; Roberts *v.* The State, 61 Ala. 401; Pinckard *v.* The State, 62 Ala. 167; Duvall *v.* The State, 63 Ala. 12; Smitherman *v.* The State, 63 Ala. 24.

Arkansas. — Wilson *v.* The State, 5 Pike, 513; Barton *v.* The State, 29 Ark. 68; Johnson *v.* The State, 32 Ark. 181; The State *v.* Jourdan, 32 Ark. 203; The State *v.* Parker, 34 Ark. 158; The State *v.*

same; except that, in setting out the latter, the pleader introduces into the form for the former, in a manner to cover the

McMinn, 34 Ark. 160; Boykin *v.* The State, 34 Ark. 443.

California. — People *v.* Winkler, 9 Cal. 234; People *v.* Green, 15 Cal. 512; People *v.* Connor, 17 Cal. 354; People *v.* Brown, 27 Cal. 500; People *v.* Quvise, 56 Cal. 396.

Connecticut. — The State *v.* Holmes, 28 Conn. 230; The State *v.* Wilson, 30 Conn. 500; The State *v.* Tuller, 34 Conn. 280; The State *v.* Fenn, 41 Conn. 590.

Georgia. — McCoy *v.* The State, 15 Ga. 205; Davis *v.* The State, 33 Ga. 98; Black *v.* The State, 36 Ga. 447; Davis *v.* The State, 40 Ga. 229; Frain *v.* The State, 40 Ga. 529, 531; Jenkins *v.* The State, 50 Ga. 258; Carter *v.* The State, 53 Ga. 326; Inman *v.* The State, 54 Ga. 219; Alderman *v.* The State, 57 Ga. 367, 368; Miller *v.* The State, 58 Ga. 200; Smith *v.* The State, 60 Ga. 430.

Idaho. — People *v.* Freeman, 1 Idaho Ter. N. S. 322.

Illinois. — Myers *v.* People, 26 Ill. 173.

Indiana. — The State *v.* Murphy, 8 Blackf. 498; Hall *v.* The State, 8 Ind. 439; Daily *v.* The State, 10 Ind. 536; Ulmer *v.* The State, 14 Ind. 52; Holland *v.* The State, 22 Ind. 343; Walker *v.* The State, 23 Ind. 61; Hoskins *v.* The State, 27 Ind. 470; King *v.* The State, 44 Ind. 285; Beard *v.* The State, 54 Ind. 413; Hart *v.* The State, 55 Ind. 599; The State *v.* Miller, 58 Ind. 399; Jones *v.* The State, 59 Ind. 229; Good *v.* The State, 61 Ind. 69; Umphrey *v.* The State, 63 Ind. 223; Gregg *v.* The State, 64 Ind. 223; Johnson *v.* The State, 68 Ind. 43; The State *v.* Allisbach, 69 Ind. 50; Stout *v.* The State, 78 Ind. 492; The State *v.* Doe, 79 Ind. 9.

Iowa. — The State *v.* Hoppe, 39 Iowa, 468; The State *v.* Gleason, 56 Iowa, 203; The State *v.* McIntire, 59 Iowa, 267; The State *v.* Pierson, 59 Iowa, 271.

Kansas. — Wessells *v.* Territory, McCahon, 100; The State *v.* Ingram, 16 Kan. 14.

Kentucky. — Elliott *v.* Commonwealth, 12 Bush, 176; McBride *v.* Commonwealth, 13 Bush, 337; Jones *v.* Commonwealth, 13 Bush, 356; Miller *v.* Commonwealth, 78 Ky. 15.

Louisiana. — The State *v.* Lartigue, 29 La. An. 642; The State *v.* Thomas, 30 La. An. 600.

Maine. — The State *v.* McAllister, 26 Maine, 374; The State *v.* Savage, 32 Maine, 583; The State *v.* Carver, 49 Maine, 588; The State *v.* Bartlett, 55 Maine, 200; The State *v.* Stevens, 62 Maine, 284; The State *v.* Leavitt, 66 Maine, 440.

Maryland. — Peter *v.* The State, 4 Har. & McH. 3; The State *v.* Cassel, 2 Har. & G. 407; The State *v.* Dowell, 3 Gill & J. 310; The State *v.* Evans, 7 Gill & J. 290; Wedge *v.* The State, 12 Md. 232.

Massachusetts. — Commonwealth *v.* Smith, 1 Mass. 245; Commonwealth *v.* James, 1 Pick. 375; Commonwealth *v.* Curtis, 11 Pick. 134; Commonwealth *v.* Merrifield, 4 Met. 468; Hope *v.* Commonwealth, 9 Met. 134; Commonwealth *v.* Simpson, 9 Met. 138; Commonwealth *v.* Williams, 9 Met. 273; Commonwealth *v.* McDonald, 5 Cush. 365; Commonwealth *v.* Adams, 7 Gray, 43; Commonwealth *v.* Beaman, 8 Gray, 497; Commonwealth *v.* Sherman, 105 Mass. 169; Commonwealth *v.* Fortune, 105 Mass. 592; Commonwealth *v.* Glover, 111 Mass. 395; Commonwealth *v.* Smith, 111 Mass. 429; Commonwealth *v.* Randall, 119 Mass. 107; Commonwealth *v.* Gallagher, 126 Mass. 54.

Michigan. — Merwin *v.* People, 26 Mich. 298; Brown *v.* People, 29 Mich. 232.

Minnesota. — The State *v.* Taunt, 16 Minn. 109; The State *v.* Loomis, 27 Minn. 521.

Missouri. — Steerman *v.* The State, 10 Misso. 503; Wein *v.* The State, 14 Misso. 125; The State *v.* Matthews, 20 Misso. 55; The State *v.* Edwards, 36 Misso. 394; The State *v.* Casteel, 53 Misso. 124; The State *v.* Williams, 54 Misso. 170; The State *v.* Arter, 65 Misso. 653; The State *v.* English, 67 Misso. 136, 137; The State *v.* Schatz, 71 Misso. 502; The State *v.* Craft, 72 Misso. 456; The State *v.* Welch, 73 Misso. 284; The State *v.* Hughes, 76 Misso. 323.

Nevada. — The State *v.* Berryman, 8 Nev. 262, 268.

New Hampshire. — The State *v.* Nelson, 8 N. H. 163; Arlen *v.* The State, 18 N. H.

terms of the statute, averments of the special facts which render it compound. So much, therefore, of the foregoing formula as charges a simple larceny, requiring only to be thus augmented to charge also a compound larceny, is, when reduced to its smallest proportions, —

That A, &c. on, &c. at, &c. one, &c. [setting out the things stolen, and their respective values when essential to the punishment], of the property of X, feloniously did steal, take, and carry away; against the peace, &c.

§ 584. **By Servant, &c.** — Under such statutory words as "if

563; The State *v.* Cotton, 4 Fost. N. H. 143; The State *v.* Goodrich, 46 N. H. 186; The State *v.* Snyder, 50 N. H. 150.

New York. — People *v.* Maxwell, 1 Wheeler Crim. Cas. 163; People *v.* Butler, 3 Cow. 347; Phelps *v.* People, 72 N. Y. 334, 336, 6 Hun, 401, 402, 403; People *v.* Phelps, 49 How. Pr. 437; Gibson *v.* People, 5 Hun, 542; People *v.* Jackson, 8 Barb. 637; People *v.* Cæsar, 1 Parker C. C. 645; Shay *v.* People, 4 Parker C. C. 353, 355.

North Carolina. — The State *v.* Jernigan, 3 Murph. 12; The State *v.* Arrington, 3 Murph. 571; The State *v.* Allen, 3 Hawks, 614; The State *v.* Clark, 8 Ire. 226; The State *v.* McLeod, 5 Jones, N. C. 318; The State *v.* Brown, 8 Jones, N. C. 443; The State *v.* Simons, 70 N. C. 336; The State *v.* Gaston, 73 N. C. 93; The State *v.* Krider, 78 N. C. 481; The State *v.* Liles, 78 N. C. 496; The State *v.* McCoy, 89 N. C. 466.

Ohio. — Stanley *v.* The State, 24 Ohio State, 166.

Oregon. — The State *v.* Lee Ping Bow, 10 Oregon, 27.

Pennsylvania. — Fulmer *v.* Commonwealth, 1 Out. Pa. 503.

South Carolina. — The State *v.* Thomas, 2 McCord, 527; The State *v.* Major, 14 Rich. 76; The State *v.* Hamblin, 4 S. C. 1.

Tennessee. — Hampton *v.* The State, 8 Humph. 69; Bolton *v.* The State, 5 Coldw. 650; Wedge *v.* The State, 7 Lea, 687.

Texas. — Goodson *v.* The State, 32 Texas, 121; The State *v.* Stephens, 32 Texas, 155; Prim *v.* The State, 32 Texas, 157; The State *v.* Mansfield, 33 Texas, 129; Potter *v.* The State, 39 Texas, 388; Musquez *v.* The State, 41 Texas, 226; The State *v.* Earp, 41 Texas, 487; The State *v.* Williamson, 43 Texas, 500, 503; Wenz *v.* The State, 1 Texas Ap. 36; Quitzow *v.* The State, 1 Texas Ap. 47, 49; Lavarre *v.* The State, 1 Texas Ap. 685, 686; Harris *v.* The State, 2 Texas Ap. 102, 104; Ware *v.* The State, 2 Texas Ap. 547; Addison *v.* The State, 3 Texas Ap. 40, 42; Snow *v.* The State, 6 Texas Ap. 284; Conner *v.* The State, 6 Texas Ap. 455, 459; West *v.* The State, 6 Texas Ap. 485, 486; Lancaster *v.* The State, 9 Texas Ap. 393; Roth *v.* The State, 10 Texas Ap. 27; McAdams *v.* The State, 10 Texas Ap. 317; Dreyer *v.* The State, 11 Texas Ap. 503; Cummins *v.* The State, 12 Texas Ap. 121, 122; Williams *v.* The State, 12 Texas Ap. 395, 397.

Vermont. — The State *v.* S. L. 2 Tyler, 249; The State *v.* White, 2 Tyler, 352; The State *v.* Jenkins, 2 Tyler, 377; The State *v.* Gilbert, 13 Vt. 647; The State *v.* Newton, 42 Vt. 537.

Virginia. — Halkem *v.* Commonwealth, 2 Va. Cas. 4; Blevins's Case, 5 Grat. 703; Speers *v.* Commonwealth, 17 Grat. 570; Adams *v.* Commonwealth, 23 Grat. 949; Johnson *v.* Commonwealth, 24 Grat. 555; Johnson *v.* Commonwealth, 29 Grat. 796; Robinson *v.* Commonwealth, 32 Grat. 866.

West Virginia. — Fredrick *v.* The State, 3 W. Va. 695; The State *v.* Vest, 21 W. Va. 796, 797.

Wisconsin. — Ford *v.* The State, 3 Pin. 449; McEntee *v.* The State, 24 Wis. 43.

United States. — United States *v.* Davis, 5 Mason, 356; United States *v.* Moulton, 5 Mason, 537.

any clerk or servant shall steal, &c. of his master," &c. the allegations may be, —

That A, &c. on, &c. at, &c. being[1] the servant [*or* clerk] of X, one, &c. [as in the last form], of the property of the said X his master, did then and there feloniously steal, take, and carry away; against the peace, &c.[2]

§ 585. **In Night.** — The allegations may be, —

That A, &c. on, &c. [as in burglary, ante, § 253, 254. And see ante, § 87. The rest as in ante, § 583].[3]

§ 586. **With Breaking and Entering.** — Where the aggravation consists of breaking and entering a building, wherein the larceny is committed, the analogies of burglary will show how the indictment should be.[4]

§ 587. **With Putting in Fear.** — The words of 3 Will. & M. c. 9, § 1, creating some capital felonies, are, among others, "shall feloniously take away any goods or chattels, being in any dwelling-house, the owner or any other person being therein and put in fear;" and Chitty has, under this clause, the following: —

That A, &c. on, &c. [with force and arms[5]], at, &c. one silver teapot of the value of, &c. of the goods and chattels of one X, in the dwelling-house of her the said X there situate then and there found and being, feloniously did steal, take, and carry away; and her the said X, then and there being in the said dwelling-house, did then and there put in bodily fear of her life; against the peace, &c.[6]

§ 588. **From Particular Place.**[7] — The statutes enhancing the punishment of larcenies when committed in particular places,

[1] It would accord with some of the precedents, and it would make the allegation apparently more precise, to add here "and while he was." But, alike in reason and authority, it is not necessary. Rex *v.* Somerton, 7 B. & C. 463.

[2] For other forms and precedents, see Crim. Proced. II. § 775; 6 Cox C. C. App. 13; Rex *v.* Somerton, supra; Reg. *v.* Heath, 2 Moody, 33; Reg. *v.* Holloway, 1 Den. C. C. 370; Reg. *v.* West, Dears. & B. 109, 110, note, 7 Cox C. C. 183; Reg. *v.* Gorbutt, Dears. & B. 166, 7 Cox C. C. 221; Reg. *v.* Jennings, Dears. & B. 447, 7 Cox C. C. 397; Reg. *v.* Hinley, 2 Moody & R. 524.

[3] For precedents, see 3 Chit. Crim. Law, 972, 979; Commonwealth *v.* Glover, 111 Mass. 395; The State *v.* Carver, 49 Maine, 588; Johnson *v.* Commonwealth, 29 Grat. 796; The State *v.* Bartlett, 55 Maine, 200.

[4] For the form, see ante, § 254, 255; Crim. Proced. II. § 777; 3 Chit. Crim. Law, 985, 986; Johnson *v.* Commonwealth, 29 Grat. 796; Commonwealth *v.* Glover, 111 Mass. 395; The State *v.* Bartlett, 55 Maine, 200; The State *v.* Carver, 49 Maine, 588.

[5] Needless. Ante, § 43.

[6] 3 Chit. Crim. Law, 986; Crim. Proced. II. § 778. For a form adjudged not good, see Rex *v.* Etherington, 2 Leach, 4th ed. 671.

[7] Crim. Proced. II. § 778; Crim. Law, II. § 900–902; Stat. Crimes, § 233, 234.

which they specify, are in varying terms, and the pleader should be careful to follow those of the one on which he is proceeding. The form, to be varied with the differing statutes, may be, —

That A, &c. on, &c. at, &c. did, in the dwelling-house [*or* shop, *or* store, *or*, &c. employing the term in the statute when sufficiently definite [1]] of X, one, &c. [setting out the articles stolen, and, when necessary, their respective values [2]], of the property [3] of the said X [*or* of Y], then being in said dwelling-house [*or*, shop, &c.],[4] feloniously steal, take, and carry away; against the peace, &c.[5]

§ 589. **From the Person.**[6] — The indictment must cover the special statutory terms; but, assuming that it does, it may be the same as for simple larceny,[7] enlarged by the words, in any appropriate connection, "from the person of the said X." Thus, —

That A, &c. [as at ante, § 583, down to and including "property of X"], from the person of the said X,[8] feloniously did steal, &c.[9]

[1] Such words as "dwelling-house," "shop," and "store" are sufficiently specific; and, if one of them is in the statute, the pleader has only to transfer it to the indictment. Query, as to "building." Commonwealth *v.* Smith, 111 Mass. 429; Rex *v.* Hickman, 1 Leach, 4th ed. 318; Crim. Proced. II. § 779. If "public place" were the statutory term, it would not suffice in the indictment, but the particular public place must be stated. Stat. Crimes, § 902–906; ante, § 493.

[2] Ante, § 582, 583.

[3] Ante, § 582 and note.

[4] **Then being, &c.** — This clause would seem, on first impression, not to be necessary, except to cover special statutory terms; because the averment that the defendant stole the goods in the dwelling-house carries with it the idea that they were in it. And see ante, § 582 and note. On the other hand, as statutes of this sort are interpreted to extend only to goods under the protection of the place and otherwise within their spirit (Stat. Crimes, § 233, 234; Crim. Law, II. § 902), there would appear to be ground for requiring even more of allegation than is contained in this clause. The form, as given in the text, accords with the majority of the precedents, which certainly do not demand more, and it might not be quite safe with less.

[5] See, for forms and precedents for larceny **From Dwelling-house**, — ante, § 587; 3 Chit. Crim. Law, 985–987; 6 Cox C. C. App. 16; Rex *v.* Pope, 1 Leach, 4th ed. 336; Rex *v.* Campbell, 2 Leach, 4th ed. 564; Campbell *v.* Reg. 1 Cox C. C. 269, 11 Q. B. 799, 800; Commonwealth *v.* Curtis, 11 Pick. 134; Commonwealth *v.* Williams, 9 Met. 273; Inman *v.* The State, 54 Ga. 219; Smith *v.* The State, 60 Ga. 430; Sallie *v.* The State, 39 Ala. 691; Moore *v.* The State, 40 Ala. 49. **From Storehouse**, — Davis *v.* The State, 33 Ga. 98; Jenkins *v.* The State, 50 Ga. 258. **From Shop, &c.** — 3 Chit. Crim. Law, 986. **From Lodging-room**, — Rex *v.* Goddard, 2 Leach, 4th ed. 545; Rex *v.* Burnel, 2 Leach, 4th ed. 588; Rex *v.* Palmer, 2 Leach, 4th ed. 680. **From Building**, — Commonwealth *v.* Smith, 111 Mass. 429. **From Church**, — 3 Chit. Crim. Law, 987. **From Wrecked Ship**, — 3 Chit. Crim. Law, 1098.

[6] Crim. Law, II. § 895–899; Crim. Proced. II. § 780.

[7] Ante, § 583.

[8] Crim. Proced. II. § 780.

[9] For forms and precedents, see 3 Chit. Crim. Law, 988; 6 Cox C. C. App. 18; Rex *v.* Craddock, 2 Den. C. C. 31; Reg. *v.* Fallon, Leigh & C. 217, 9 Cox C. C. 242; Du Bois *v.* The State, 50 Ala. 139.

§ 590. *Description of Things stolen:* —

Special Care — is required in this part of the indictment. For not only must it be legally sufficient, but in prudence it should be such as not needlessly to embarrass the proofs at the trial. For example, the color of an article or an animal is often uncertain, or it varies with the lights in which it is seen, or the witness is color blind. Its averment is never necessary, and consequently is never prudent. And the same observation applies to various other descriptive matter which incautious pleaders are in the habit of introducing into their allegations to create trouble at the trial. For however unnecessary such matter may be, it must be proved precisely as laid or the case will miscarry by reason of the variance.[1]

§ 591. **Elsewhere — Here.** — In "Criminal Procedure" we saw what are the legal requirements.[2] The purpose here will be to present some forms which, while good in law, are practicably convenient. If not complete, they will furnish analogies to which others may conform.

§ 592. **For Common-law Larcenies.** — For the larceny of articles which are the subjects of this offence at the common law, the descriptions of them may be such as —

One horse [*or* colt, *or* mare, *or* gelding], of the value of, &c. [*or* two horses each[3] of the value of, &c. *or*, two horses the one of the value of, &c. and the other of the value of, &c.; *or*, one horse of the value of, &c. one horse of the value of, &c. and one other horse of the value of, &c.].[4]

Three cows each of the value of, &c.;[5] one ox of the value of, &c. [*or* two oxen each of the value of, &c.];[6] six sheep each of the value of, &c.;[7] one carcass of mutton [*or* one sheep killed and dressed for food] of the value of, &c.;[8] seven hogs, two thereof each of the value of, &c. two others thereof each of the value of, &c. and one thereof of the value of, &c.;[9] one barrel of pork [*or* twenty-five pounds of pork] of the value of, &c.

[1] Crim. Proced. I. § 485, 486, 488; Stat. Crimes, § 443.

[2] Crim. Proced. II. § 700–712, 731–735.

[3] Ante, § 582 and note.

[4] Crim. Proced. II. § 700, 713–715; Stat. Crimes, § 212, 247, note, 248, 426, 440, 442. For precedents, see Maynard *v.* The State, 46 Ala. 85; Myers *v.* People, 26 Ill. 173; The State *v.* Major, 14 Rich. 76; Halkem *v.* Commonwealth, 2 Va. Cas. 4; Snow *v.* The State, 6 Texas Ap. 284; 3 Chit. Crim. Law, 980.

[5] Crim. Proced. and Stat. Crimes as above; The State *v.* Hamblin, 4 S. C. 1; Stollenwerk *v.* The State, 55 Ala. 142; People *v.* Winkler, 9 Cal. 234.

[6] The State *v.* Leavitt, 66 Maine, 440; Musquez *v.* The State, 41 Texas, 226.

[7] 3 Chit. Crim. Law, 980; Reg. *v.* Barran, Jebb, 245; Reg. *v.* Martin, 1 Den. C. C. 398, 399, 2 Car. & K. 950, 3 Cox C. C. 447.

[8] The single word "sheep," "ox," "cow," &c. means the live animal. Crim. Proced. II. § 708.

[9] Beard *v.* The State, 54 Ind. 413; Boy-

Twenty pounds of wool [in a case where the defendant caught live sheep and pulled the wool from them] each pound thereof of the value of, &c.;[1] one thousand gallons of water [taken from a water-supply company] each hundred gallons thereof of the value of, &c.;[2] ten thousand cubic feet of illuminating gas [where the defendant surreptitiously attached a pipe to the supply pipe of a gas company], each cubic foot thereof of the value of, &c.;[3] six quarts of milk [as well where it is taken by milking another's cow as in other cases], each quart thereof of the value of, &c.[4]

Twelve pounds of beef, each pound thereof of the value of, &c.; fourteen pounds of lamb,[5] killed and dressed for food, each pound thereof of the value of, &c.; one turkey, killed and dressed for food, of the value of, &c.;[6] three eggs of hens,[7] each egg of the value of, &c.[8]

§ 593. **Other Forms** — may readily be constructed by considering these and the expositions in "Criminal Procedure" and "Statutory Crimes."[9]

kin *v.* The State, 34 Ark. 443; McDowell *v.* The State, 61 Ala. 172; Bonner *v.* The State, 55 Ala. 242; Hunt *v.* The State, 55 Ala. 138; The State *v.* Matthews, 20 Misso. 55.

[1] Rex *v.* Martin, 1 Leach, 4th ed. 171.

[2] In Ferens *v.* O'Brien, 15 Cox C. C. 332, the averment was "feloniously did steal, take, and carry away two buckets of water of the value of one penny," &c. The defendant had drawn the water, without permission, from the tap of a water-supply company. There was a conviction without objection to the form of the allegation. But, with us, a charge of stealing two "bottles" of a liquid is held not to be sustained by proof that the defendant filled his own bottles from the cask of the injured person. Crim. Proced. II. § 710. And plainly, in both these cases, the fluid was stolen before it became a "bucket" or "bottle" thereof. Yet as a gallon is a measure independent of the particular vessel holding it, there was a certain number of gallons as well before the theft as afterward.

[3] Reg. *v.* White, Dears. 203, 6 Cox C. C. 213; Commonwealth *v.* Shaw, 4 Allen, 308; Reg. *v.* Firth, Law Rep. 1 C. C. 172.

[4] Of course, the allegation in other terms may be equally good. A precedent in 3 Chit. Crim. Law, 982, is, —

That A, &c. on. &c. at, &c. "unlawfully did enter a certain stable there situate, belonging to one X, and then and there unlawfully and injuriously did milk a certain cow, of and belonging to the said X, being in the stable of him the said X; and that he the said A by such milking did then and there draw and extract three quarts of milk, of the value of three pence, from and out of the said cow; and the said three quarts of milk, so drawn and extracted as aforesaid, of the goods and chattels of the said X, he the said A then and there unlawfully and feloniously did steal, take, and carry away," &c.

[5] Perhaps "fourteen pounds of lamb" would be held to indicate the killed and dressed article, not the living creature. But the fuller form in the text is certainly safe.

[6] Compare with Crim. Proced. II. § 706.

[7] "Of hens," necessary. Ib. § 707.

[8] "Meat." — All these things, and many more, are "meat;" therefore the word "meat" is too indefinite. Crim. Proced. II. § 700.

[9] **Coin.** — How to describe coin, current and uncurrent, ante, § 403 and note, 404, 407, 423, note; Crim. Proced. II. § 703–705; 3 Chit. Crim. Law, 960, 987; 6 Cox C. C. App. 7, 137; Sallie *v.* The State, 39 Ala. 691; The State *v.* Bartlett, 55 Maine, 200; Daily *v.* The State, 10 Ind. 536; The State *v.* Evans, 7 Gill & J. 290; Lavarre *v.* The State, 1 Texas Ap. 685, 686. **Books — Printed Sheets.** — One hundred copies of the printed sheets of a certain publication called, &c. is good, but not supported by proof of the larceny of them after they are bound. Commonwealth *v.* Merrifield, 4 Met. 468.

§ 594. **Statutory Larcenies.** — Where a thing is newly made the subject of larceny by a statute, it should be described after the analogies from the rules for common-law larceny, following also the statutory terms, as in other indictments on statutes.[1] Hence, —

§ 595. **Practical Methods.** — As the statutes of our States vary, and even those of the same State change from time to time, it is not safe simply to follow a printed form, whether found in a book of precedents or in an adjudged case. The pleader, before he draws the indictment, should lay before him the particular statute on which he is to proceed, with the judicial interpretations of it which the courts have made, or he deems they will make.[2] And he should bear in mind, that he must cover its interpreted terms, according to the ordinary rules for indictments on statutes,[3] and at the same time satisfy the common-law rules for describing the things stolen. Thus, —

§ 596. **Ore from Mine.** — Under a statute making it larceny to "steal . . . the ore of any metal . . . from any mine," [4] the ore should be described according to the rules of the common law; that is, if we follow the ordinary precedents, by saying so many pounds of ore. Then, looking into the statute, we find the added words "of any metal;" and these must be covered. Probably the word "metal" alone would be deemed too general in allegation, consequently the species of it should be stated.[5] And, lastly, we have the statutory expression "from any mine." This also must be taken into the averments; and it will not be adequate simply to say, after the ordinary common-law precedents, "then and there being found." [6] The form may be, —

That A, &c. on, &c. at, &c. did feloniously steal, take, and carry away, from the mine of copper of X, twenty pounds of copper ore, of the value of, &c. of the property of the said X; against the peace, &c.[7]

§ 597. **Lead fixed to Dwelling-house.** — Under the statutory words "steal, rip, cut, or break with intent to steal, any lead, &c. being fixed to any dwelling-house," &c.[8] the averments are governed by the same principles; thus, —

[1] Crim. Proced. II. § 730 et seq.; Stat. Crimes, § 416.

[2] Ante, § 32–34.

[3] Crim. Proced. I. § 608–642.

[4] 24 & 25 Vict. c. 96, § 38 (re-enacting, in substance, 2 & 3 Vict. c. 58, § 10).

[5] Crim. Proced. I. § 619.

[6] Reg. *v.* Trevenner, 2 Moody & R. 476.

[7] For forms, see Reg. *v.* Trevenner, supra. And, under the modified English procedure, Archb. Crim. Pl. & Ev. 19th ed. 397; 6 Cox C. C. App. 10, 11.

[8] 4 Geo. 2, c. 32.

That A, &c. on, &c. at, &c. sixty pounds of lead, of the value of, &c. of the property of X, then and there being fixed to the dwelling-house of the said X, feloniously did rip, steal, take, and carry away; against the peace, &c.[1]

§ 598. **Things Growing on Land** — are in most of our States made the subject of larceny, but in varying terms. Under a provision to punish "any person who shall unlawfully go upon the lands of another, and any person who shall unlawfully pull off, or pull off and carry away, any corn growing on the stalk, or any fruit on the tree, bush, or plant, pumpkin or melon on the vine, or other annual product attached to the realty, or growing in the soil, of the value of ten cents, or upwards, the property of another," — creating, the reader perceives, a misdemeanor similar to but not larceny, — it will be good in allegation to say, —

That A, &c. on, &c. at, &c. unlawfully went upon the land there of one X,[2] and upon said land then unlawfully pulled off and carried away therefrom one half bushel of corn in the ear there growing on the stalk, of the value of, &c. of the property of said X; against the peace, &c.[3]

§ 599. **Another.** — Under a statute making it "petit larceny" for one to "steal, take, and carry away any roots, plants, grain, corn, flax, hemp, or any cultivated grass or fruit, in which he has no right or interest, standing, lying, or being on the land of another," it will be good in allegation to say, —

That A, &c. on, &c. at, &c. did unlawfully [and feloniously[4]] steal, take, and carry away from the land of one X there,[5] one bushel of corn then standing and being on said land [of the value of, &c.[6]], of the prop-

[1] 3 Chit. Crim. Law, 973. And see, for other forms, Rex *v.* Hickman, 1 Leach, 4th ed. 318; 6 Cox C. C. App. 8–10. For the larceny of lead fixed to a wharf, under the similar statute of 7 & 8 Geo. 4, c. 29, § 44, the allegations are substantially the same, Reg. *v.* Rice, Bell C. C. 87, 8 Cox C. C. 119.

[2] In the form before me, the pleader proceeds here to describe the land. But in principle this cannot be necessary. Ante, § 442 and note, 444 and note; Dorrell *v.* The State, 80 Ind. 566.

[3] The State *v.* Allisbach, 69 Ind. 50. And see post, § 599, 600. This offence is likewise a species of trespass on land; also, of malicious mischief. See those titles.

[4] The word "feloniously" is not in the form before me. At common law, petit larceny is a felony, and it should be laid as committed feloniously. But it is misdemeanor in some of the States; when, of course, the word "feloniously" is not required. Crim. Law, I. § 679, 935.

[5] The form before me describes the land; as to which, see ante, § 598 and note.

[6] On a statute simply in the words quoted in this section, this allegation, though in the form before me, is not necessary. Ante, § 174, 403, 420, 582, and the notes thereto.

erty of the said X, he the said A not then and there having in said corn any right or interest; against the peace, &c.[1]

§ 600. **Growing or Outstanding Crop.** — The provisions in the last two sections may be deemed within the general class of legislation, prevailing in various States, for the protection of a growing or outstanding crop. The statutes are diverse, and the indictment must cover the particular one on which it is drawn.[2]

§ 601. **Writings.** — The method of charging a writing, made by statute a subject of larceny, appears in the foregoing and in "Criminal Procedure."[3] In the statutory words or their equivalents,[4] and in so many of them as to include all qualifying matter,[5] it is designated simply as any ordinary chattel is, in the common-law indictment.[6] Thus, —

§ 602. **Bank-note.** — On the single term "bank-note" in a statute, accompanied by nothing to require enlargement or limitation, it is adequate and practically best, where the proofs will be sufficiently definite, to say, —

One bank-note [*or* bank-bill] for the payment and of the value of, &c. of the property of, &c. [*or*, five bank-notes, each for the payment and of the value of, &c. of the property of, &c.].[7]

[1] The State *v.* Schatz, 71 Misso. 502. And see post, § 600.

[2] Consult The State *v.* Pender, 83 N. C. 651; Holly *v.* The State, 54 Ala. 238; Harris *v.* The State, 60 Ala. 50; The State *v.* Sears, 71 N. C. 295. There are forms in Peacher *v.* The State, 61 Ala. 22; Lyon *v.* The State, 61 Ala. 224; Pinckard *v.* The State, 62 Ala. 167; Smitherman *v.* The State, 63 Ala. 24; Johnson *v.* The State, 68 Ind. 43; The State *v.* Liles, 78 N. C. 496; The State *v.* Walker, 87 N. C. 541. And see the title TRESPASS TO LAND.

[3] Ante, § 594 et seq.; Crim. Proced. II. § 714, 731, 732.

[4] Crim. Proced. I. § 612, 618, 619. Thus, if the term in the statute is "bank-note," the word of larger meaning "note" will not suffice in allegation. Rex *v.* Craven, Russ. & Ry. 14.

[5] Ante, § 596; Crim. Proced. II. § 734; Kearney *v.* The State, 48 Md. 16.

[6] Crim. Proced. II. § 732–735; Rex *v.* Johnson, 3 M. & S. 539; People *v.* Jackson 8 Barb. 637.

[7] Crim. Proced. II. § 732. In the leading case of Rex *v.* Johnson, 3 M. & S. 539, the allegation, which was adjudged good, was "divers, to wit, nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of," &c. And Lord Ellenborough, C. J. said: "I consider that, after the statutes made bank-notes the subject of larceny, they might be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel. . . . Now, in this indictment, the notes are described as bank-notes; it sets forth both number, value, and species. Bank-note is the species, the value is nine pounds, and the number is stated to be nine. And thus we find there has been a compliance with the strict and literal rule of law. . . . It has been argued as if the prosecutor was bound to prove the exact amount of the value and number laid, whereas if he proved only one bank-note of the value of one pound, it would be sufficient to maintain

§ 603. **Same — (Description, &c. unknown).** — In the greater number of cases, it is impossible for the prosecuting power to describe the bank-bills thus precisely; so the description should be made as near to the foregoing form as the proofs will admit, with the proper averment of the grand jury's want of knowledge.[1] The pleader should not follow a general formula for this, but adhere to the special facts. Some of the methods which have been accepted in our courts are, —

"Divers bank-bills, commonly known and denominated national currency, of divers denominations, the number and denomination of which are to the grand jury unknown, of the amount and value of six hundred and fifty dollars, which said bank-bills circulated and passed as money, and which were then and there the property and in the possession of," &c.[2]

"Divers promissory notes, payable to the bearer on demand, current as money in said Commonwealth, of the amount and of the value of eighty dollars, a more particular description of which is to the jurors unknown," &c.[3]

"Divers notes of the United States currency, the number and denomination of which are to the grand jurors aforesaid unknown, for the payment

the charge. If the indictment had charged the things to have been nine printed books of the value of nine pounds, instead of nine bank-notes, and one book had been proved to have been stolen, it would have been well enough; so here it is laid that the amount is nine, and the value nine pounds, and why is not this the same? The total amount in both cases imports that the number consists of more than one, but still more than one need not be proved." p. 547, 548. Still in some circumstances and before some courts, this form, while legally good, will be practically embarrassing, as explained in Crim. Proced. II. § 714. And see the North Carolina case of The State *v.* Brown, 8 Jones, N. C. 443. Chitty's form, much followed, is, besides some surplusage, "one bank-note for the payment of ten pounds, and of the value of ten pounds," of the property, &c. 3 Chit. Crim. Law, 974 *a*. Similar, for example, are the indictments in Rex *v.* Pearson, 1 Moody, 313, 314; Reg. *v.* Craddock, 2 Den. C. C. 31; Rex *v.* Walsh, 2 Leach, 4th ed. 1054, Russ. & Ry. 215. And see forms in Adams *v.* Commonwealth, 23 Grat. 949; Johnson *v.* Commonwealth, 24 Grat. 555; The State *v.* Cotton, 4 Fost. N. H. 143; The State *v.* Cassel, 2 Harr. & G. 407. Some of those American forms which more or less differ from the one in our text, are —

"One note of the United States currency, for the payment of twenty dollars, and of the value of twenty dollars," &c. Johnson *v.* Commonwealth, 29 Grat. 796.

"Ten promissory notes called bank-notes, issued by the Chickapee Bank, for the payment of divers sums of money, amounting in the whole to the sum of fifty dollars, and of the value of fifty dollars; ten promissory notes called bank-notes, issued by the Agawam Bank, for the payment of divers sums of money, amounting in the whole to the sum of fifty dollars, and of the value of fifty dollars, &c. of the goods, chattels, and property of," &c. People *v.* Jackson, 8 Barb. 637.

"One wallet of the value of seventy-five cents; one United States note, commonly called greenback, of the value of ten dollars; and one United States note, commonly called greenback, of the value of two dollars; two United States notes, &c. [as above]; two bills purporting to be issued by some national bank, so called, of the value of five dollars each, of the moneys," &c. McEntee *v.* The State, 24 Wis. 43.

[1] Crim. Proced. I. § 493–498; II. § 705.

[2] The State *v.* Hoppe, 39 Iowa, 468.

[3] Commonwealth *v.* Gallagher, 126 Mass. 54; Commonwealth *v.* Glover, 111 Mass. 395.

of divers sums of money, in the whole amounting to the sum of forty dollars, the property and notes of," &c.[1]

"Divers and sundry genuine and current treasury notes, of different denominations, issued by the treasury department of the United States, and divers and sundry genuine and current bank-notes, of different denominations, issued by different and sundry national banks, organized under the laws of the United States, all of which treasury notes and bank-notes amounted to the sum of and were of the value of two hundred and fifty dollars, and were the property of one X; a more particular description of which treasury notes and bank-notes, or of any or either of them, is to the said grand jury unknown." [2]

§ 604. **Promissory Note — Bill of Exchange.** — Promissory notes and bills of exchange may be averred in the same short way, unless the statute has descriptive or limiting words which the rules of pleading on statutes require to be covered. Thus, —

Two promissory notes each for the payment of one hundred dollars, of the value of one hundred dollars, and one bill of exchange for the payment of five hundred dollars, of the value of five hundred dollars, severally the property of, &c.[3]

§ 605. **Other Writings** — are in larceny described after the same rules. Practically, in all, the pleader is sometimes needlessly minute.[4]

§ 606. **Animals and Fish.** — Under this head the foregoing forms and directions, in connection with explanations in "Criminal Procedure" and "Statutory Crimes," [5] will suffice. But a reference to some places where precedents may be found, will be convenient.[6]

[1] Johnson *v.* Commonwealth, 29 Grat. 796.

[2] The State *v.* Taunt, 16 Minn. 109. This form might, in almost any state of the facts, be made more compact and convenient of management at the trial. For a form good in Alabama, while not drawn on the Code, see Du Bois *v.* The State, 50 Ala. 139.

[3] For forms and precedents, see Crim. Proced. II. § 732; 3 Chit. Crim. Law, 974, 975, 984; 6 Cox C. C. App. 7; Du Bois *v.* The State, 50 Ala. 139; The State *v.* Fenn, 41 Conn. 590.

[4] For forms see, **Larceny of Drafts,** — Phelps *v.* People, 72 N. Y. 334, 336. **Deed,** — 4 Cox C. C. App. 18. **Railroad Ticket,** — Commonwealth *v.* Randall, 119 Mass. 107. **Valuable Security,** — Reg. *v.* Heath, 2 Moody, 33; Reg. *v.* Lowrie, Law Rep. 1 C. C. 61, 10 Cox C. C. 388. **Records of Justice Court,** — Wilson *v.* The State, 5 Pike, 513.

[5] Crim. Proced. II. § 706–709, 713; Stat. Crimes, § 425–429.

[6] Deer, 3 Chit. Crim. Law, 975. Horse, 3 Chit. Crim. Law, 980. Cattle, 6 Cox C. C. App. 8; Wessells *v.* Territory, McCahon, 100; Parmer *v.* The State, 41 Ala. 416. Dog, 6 Cox C. C. App. 137; Ward *v.* The State, 48 Ala. 161. Animals, Adams *v.* The State, 60 Ala. 52; Goodson *v.* The State, 32 Texas, 121. Fish, The State *v.* Krider, 78 N. C. 481. Fish and oysters, 3 Chit. Crim. Law, 976–978.

§ 607. *Other Forms:* —

Originally Stolen in another County or State. — Since larceny consists of any asportation of the goods of another through trespass, by one who simultaneously means to steal them,[1] the complete offence is committed in every locality in which such asportation, trespass, and intent to steal concur; so that the same goods may thus be stolen successively, by the same person, in as many countries, States, and counties as he can carry them into or through. And he may be indicted in any place wherein these things transpired together, within the jurisdiction of the prosecuting power, at its election.[2] Such is the doctrine of principle, judicially sustained in a part of our States. But in large numbers of the cases, English and American, the judicial understanding has been apparently in an eclipse, and results have been announced more or less in conflict with those to which this doctrine would conduct. For example, no judge has maintained in words, that the laws of a foreign State or country could so operate with us as to exempt a man from punishment for violating our own laws on our own soil; yet many have held this in effect, refusing to convict one of the larceny of goods in our own State if he had first stolen them in another State or country, from which he brought them here.[3] Now, —

§ 608. **How the Indictment.** — Under the correct doctrine, it not being important to consider of the other cases, the sufficient and better way is to frame the indictment without any reference to what took place in other localities, simply for the larceny in the county of the jurisdiction. Where, as in some States, there is a statute on the subject, its terms will, of course, if it is the foundation of the proceeding, be pursued.[4]

§ 609. **Special Elements by Statute — (Texas).** — Where a statute has created a larceny with special elements, differing from those of the common law, they must be covered by the allegations.[5] Even a legislative enactment dispensing with this requirement will be void as unconstitutional.[6] In

[1] Crim. Law, II. § 758, 794, 799.

[2] Ib. I. § 137–142, 1061; II. § 839, 890; Crim. Proced. I. § 59, 60; II. § 727–729; Stat. Crimes, § 140.

[3] Consult the places referred to in the last note.

[4] Crim. Proced. II. § 727–729. See, for precedents, Reg. *v.* Newland, 2 Cox C. C. 283; Steerman *v.* The State, 10 Misso. 503; The State *v.* Seay, 3 Stew. 123; Alsey *v.* The State, 39 Ala. 664; Stanley *v.* The State, 24 Ohio State, 166; Cummins *v.* The State, 12 Texas Ap. 121, 122.

[5] Stat. Crimes, § 414, 418.

[6] Williams *v.* The State, 12 Texas Ap.

Texas, under a statute given elsewhere,[1] the averments may be, —

That A, &c. on, &c. at, &c. did feloniously and fraudulently steal and take from the possession of X six work oxen, each of the value of, &c. of the property of the said X, without his consent, and with the felonious and fraudulent intent to deprive him the said X of the value of the said oxen, and to appropriate them to the use and benefit of the said A; against the peace, &c.[2]

§ 610. **Statutory Larceny by Bailee.**[3] — On the same principle, as the elements of this offence differ from those of common-law larceny, the indictment must be varied accordingly,[4] so as to cover the statutory terms. Under the provision, that, "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny,"[5] the averments may be, —

That A, &c. on, &c. at &c. being the bailee[6] of a certain horse of the value of, &c. of the property of X, did then and there fraudulently and feloniously steal,[7] take, and convert the same to his own use; against the peace, &c.[8]

§ 611. *Attempts:* —

By Solicitation. — The allegations may follow the general form already given.[9] Or they may be, —

That A, &c. on, &c. at, &c. did falsely, wickedly, and unlawfully solicit and incite one X feloniously to steal, take, and carry away one, &c. [here setting out the articles to be stolen if the proofs will identify them; or, if not, make the allegation general, yet in terms which the testimony will

395, 397, 401; Insall *v.* The State, 14 Texas Ap. 145.

[1] Stat. Crimes, § 413.

[2] Stat. Crimes, § 414. And for precedents see Musquez *v.* The State, 41 Texas, 226, and the other Texas cases cited in the note to ante, § 582.

[3] Stat. Crimes, § 417–424.

[4] Ib. § 417, 418.

[5] 20 & 21 Vict. c. 54, § 4; Stat. Crimes, § 420.

[6] On principle, and according to Reg. *v.* Holman, Leigh & C. 177, 9 Cox C. C. 201; Reg. *v.* Loose, Bell C. C. 259, 8 Cox C. C. 302; and Reg. *v.* Tonkinson, 14 Cox C. C. 603, this is the proper way to set out the bailment. But something more is required in California. Stat. Crimes, § 422.

[7] This word "steal" is not in the form in Reg. *v.* Holman, supra, and probably it is not in principle necessary. Still I have inserted it for the consideration of the pleader.

[8] For precedents on this and similar statutes, see Reg. *v.* Holman, supra; Reg. *v.* Loose, supra; Reg. *v.* Tonkinson, 14 Cox C. C. 603; The State *v.* Tuller, 34 Conn. 280; McCoy *v.* The State, 15 Ga. 205; Carter *v.* The State, 53 Ga. 326; Alderman *v.* The State, 57 Ga. 367, 368.

[9] Ante, § 106. And see ante, § 258.

cover, as see ante, § 100, 106], of the value[1] of, &c. of the property of Y; against the peace, &c.[2]

§ 612. **By Picking Pocket.**[3] — The form will vary with the special facts, and with the statutes. But, in general, it may be, —

That A, &c. on, &c. at, &c. devising and intending feloniously to steal, take, and carry away from the person of X, such moneys, bank-bills, and other valuable things as he the said X might and did then have about his person and in his pockets, did then and there with said intent stealthily and secretly endeavor to and did lay hold of the clothes of the said X and thrust his hand upon and into his said pockets; against the peace, &c.[4]

§ 613. **By Marking Hog.**[5] — It is deemed good to aver, —

That A, &c. on, &c. at, &c. did unlawfully [and feloniously, if the attempt is felony] mark one certain hog [*or*, alter the ear marks of, &c.], of the value of, &c. of the personal property of X, with intent then and

[1] **Value** — Not all indictments for solicitations and other attempts allege a value. But I should recommend inserting it wherever the pleader would put it into the indictment for the accomplished larceny, as tending to enhance the punishment.

[2] For forms and precedents see Crim. Proced. II. § 74; Reg. *v.* Welham, 1 Cox C. C. 192; Reg. *v.* Gregory, Law Rep. 1 C. C. 77, 10 Cox C. C. 459; Reg. *v.* Callingwood, 2 Ld. Raym. 1116, 6 Mod. 288.

[3] For the law of this attempt, see Crim. Law, I. § 741–745.

[4] This form is new, made so because the precedents in the books seem liable to slight practical objections, which, I think, this obviates. Still the precedents are suggestive, and they will be helpful. In Reg. *v* Collins, Leigh & C. 471, 9 Cox C. C. 497, the prosecution failed by reason of a view of the law which our courts do not accept. Yet there appears to have been no doubt of the sufficiency of the indictment. It was against several persons, and it charged that they —

"Unlawfully did attempt to commit a certain felony, that is to say, that they did then [and there] put and place one of the hands of each of them into the gown pocket of a certain woman whose name is to the jurors unknown, with intent the property of the said woman, in the said gown pocket then [and there] being, from the person of the said woman to steal," &c.

In the three Massachusetts cases of Commonwealth *v.* McDonald, 5 Cush. 365; Commonwealth *v.* Sherman, 105 Mass. 169; and Commonwealth *v.* Fortune, 105 Mass. 592, the indictment was on the statute recited ante, § 194. In Commonwealth *v.* Fortune, it was against three persons, and sustained by proof that one of them put his hands into the pocket. Omitting the inevitable "force and arms" surplusage, it avers, —

That A, &c. B, &c. and C, &c. on, &c. at, &c. "did attempt feloniously to steal, take, and carry away from the person of one X the personal property of the said X then and there in pocket and in his possession, and in such attempt did then and there do a certain overt act towards the commission of said offence, to wit, did then and there feloniously, and with intent then and there feloniously to steal, take, and carry away the personal property of the said X as aforesaid, then and there being in his pocket and on his person, thrust, insert, put, and place their, said A's, B's, and C's, hands into the pocket of the said X without his knowledge and against his will, but said A, B, and C then and there did fail in the perpetration of said offence, and were intercepted and prevented in the execution of the same."

For a like precedent in Connecticut, see The State *v.* Wilson, 30 Conn. 500. And see Crim. Proced. II. § 89.

[5] See ante, § 164–166.

there to steal, take, carry away, and convert to his own use the same; against the peace, &c.[1]

§ 614. **Other Attempts.** — The forms for other attempts to steal may be modelled after the foregoing; or, for entering a building with intent, after the form for attempted burglary.[2]

§ 615. *Practical Suggestions:* —

Variance — (Adding Counts). — It is perceived that the forms in larceny are pretty uniform, except in the description of the property, including its ownership. In this particular, the indictment requires special care, in order to avoid a variance at the trial. But there is ordinarily no need of multiplying counts. The pleader can, instead, if he chooses, lay in one count the same article by different descriptions and with names of different owners, as though there were so many different articles, and let the jury find the larceny of the particular form of it which is proven.

§ 616. **Technicalities — Nice Questions — Judicial Differences.** — The counsel on both sides should bear in mind, that, in various respects, the law of larceny is exceptionally technical, — that it involves some very nice questions, — that in a few particulars it is not quite identical in our States, — and that there are in it certain questions of evidence, and especially the question of the effect of the stolen goods being found in the defendant's possession, which have divided judicial opinions, and which require an accurate discrimination. These questions need not be further pointed out here. No one should enter upon the trial of a larceny cause until he has become thoroughly familiar with them. In the other volumes of this series, they are fully and minutely considered, and the cases upon them amply cited.

[1] The State *v.* Matthews, 20 Misso. 55. **Killing.** — For killing sheep and other animals with intent to steal their carcasses, 3 Chit. Crim. Law, 981; 6 Cox C. C App. 8. **Having** — with intent, 3 Chit Crim. Law, 983, 984.

[2] Ante, § 259. For various forms and precedents, see Reg. *v.* Johnson, Leigh & C. 489, 10 Cox C. C. 13 (as to a part of which, query, Crim. Proced. II. § 87, 88); 6 Cox C. C. App. 10; Black *v.* The State, 36 Ga. 447; Jennings *v.* Commonwealth, 105 Mass. 586; The State *v.* Craft, 72 Misso. 456; The State *v.* Hughes, 76 Misso. 323.

For LASCIVIOUSNESS, see ADULTERY, &c.
LETTERS, see POST-OFFICE OFFENCES.
LEWDNESS, see ADULTERY, &c. — INCEST — NUISANCE.

CHAPTER L.

LIBEL AND SLANDER.[1]

§ 617. **How Chapter divided.** — We shall arrange the forms for these offences after the order of their manner of commission; namely, I. By Written or Printed Words; II. By Signs, Pictures, and Effigies; III. By Oral Words; adding, IV. Practical Suggestions.

I. *By Written or Printed Words.*

§ 618. **How the Indictment.** — The explanations in "Criminal Procedure"[2] inform us, that, while there are allegations which in terms or effect are always required in charging this offence, certain others are necessary or not according to the exigencies of the particular case. Always there must be a setting out of facts comprehending in full the elements of the wrong. But sometimes, to make all plain, the pleader is obliged to aver special transactions or conditions of things, — such as, that there was a tumult, or a mutiny, or something else out of which the libel arose, — while in other cases he is not. And some libels are sufficiently distinct without innuendoes, others require them.

§ 619. **Formula.** — The precedents for libel so abound in what

[1] For the direct expositions of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 905–949, Crim. Proced. II. § 781–811. Incidental, Crim. Law, I. § 110, 204, 219–221, 308, 309, 319, 457, 470, 484, 500, 540, 591, 734, 761, 799, 917; II. § 217, 265, 266; Crim. Proced. I. § 53, 57, 61, 435, 437, 452, 468, 480, 481, 486, 496, 530, 559–562, 645, 858, 1416.

[2] Crim. Proced. II. § 783–794.

is certainly surplusage [1] that the courts have not had occasion to pass upon all the words, so as to enable one to say absolutely, on authority, what may safely be omitted and what may not. But still it is true, and it may be accepted as a safe rule, that, in the language of a learned English judge in a famous case of libel, "as to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, *all beyond are surplusage*." [2] Therefore in general, and in other than exceptional cases or classes of cases, the following formula, more condensed than the forms commonly employed, is believed to satisfy the requirements of the law. Should the pleader approve it, he will vary it more or less with the differing facts, and with the cases and classes of cases which depend on special reasons: —

That on, &c. at, &c. [ante, § 80], [there existed or transpired certain specified facts], whereupon [3] A, &c. [ante, § 74–77], did then and there unlawfully and maliciously write [4] and publish of and concerning X, and [where necessary to the full understanding of the libel [5]] of and concerning, &c. [a specified subject [6]], a certain false, scandalous, and malicious [7] libel of

[1] Crim. Proced. II. § 783.

[2] Rex *v.* Horne, Cowp. 672, 683, the unanimous opinion of all the judges, by De Grey, C. J.

[3] The supposed matter thus far is of a sort varying with the cases, and so not admitting of being reduced to a form, and not always required. Ante, § 618. Where it is not inserted, the indictment will begin, "That A, &c. on, &c. at, &c."

[4] This word "write," connected with "publish," is common, but not necessary. Or it will suffice alone, if the pleader adds "with intent to publish," Crim. Proced. II. § 784; that is, an indictable attempt, at least, will be set out. Crim. Law, II. § 926, 927, 949.

[5] Crim. Proced. II. § 786.

[6] This matter cannot be reserved for the innuendoes. Ib. and § 793.

[7] **False — Scandalous — Malicious.** — I have not before me authorities enabling me to speak so positively as one would like regarding these three adjectives. Plainly enough "false" is unnecessary; for, among other reasons, under the old law, which has been only modified, it was not even a defence that the libel was true. Crim. Law, II. § 918–921. Indeed, it has been so adjudged. Rex *v.* Burks, 7 T. R. 4. I see no necessity for the word "scandalous;" because the court and jury, having the libel before them, can determine, as well without hints from the pleader as with them, whether or not it is scandalous. Besides, this is not the proper word in all libels; in some, if the spirit of the allegation is to be retained, it should be "seditious," in others "obscene," and in others "blasphemous." Practically, I should recommend retaining it in general, but making these substitutes, or adding these words, in proper cases. There can be little doubt that "maliciously," where it occurs further back, is essential, either in form, or in substance by some equivalent; for "malice," in the legal sense of the word, is the very essence of this offence. Crim. Law, I. § 429; II. § 922, 923; Crim. Proced. II. § 801, 806. And this conclusion seems irresistible when we consider that a special verdict is ill if it does not find the publishing to have been of malice. Crim. Proced. ut sup. § 806. Still there are many precedents in which the adverb "maliciously" does not appear, and it would be a bold proposition to say that they are all bad. In obscene, blasphemous, and seditious libels, while the

the tenor[1] following [*or*, probably it would suffice, yet it would be a departure from the ordinary precedents, to say, publish of, &c. certain printed (*or* written) words of the tenor following], [here, in either form of the allegation, setting out the words, or so much of the libellous article as is relied upon,[2] by exact copy, and accompanying the setting out with any innuendoes which may be required;[3] *or*, if the matter is too obscene to appear upon the record, proceed as at post, § 626]; against the peace, &c. [ante, § 65–69].[4]

cautious pleader will employ the word "maliciously," he will be likely to add "obscenely," "blasphemously," or "seditiously," or some such appropriate word; in which case, if he happens to omit "maliciously," one would hesitate to pronounce the indictment ill. But it does not follow that the adjective "malicious," in the present connection, is necessary. The court and jury hardly need to be told that words which are before them, and which were published "maliciously," are malicious words.

[1] Crim. Proced. II. § 789.

[2] **Distinct Passages.** — If the pleader sets out two or more separate passages, or matter which is not continuous (Crim. Proced. II. § 783, 791, 792; Tabart *v.* Tipper, 1 Camp. 350), he says, —

One part whereof is of the tenor following [here copying the libel, and inserting the innuendoes, until a place is reached where something is to be passed over], another part whereof is of the tenor following [here copying, as before], and another part whereof is of the tenor following, &c.

[3] Crim. Proced. II. § 783, 793, 794.

In Foreign Language. — Where the libel is in any other language than the English, a translation must follow. Ib. § 792 and places there referred to. The practice, which appears to be right in principle and is probably required by the courts, is to insert the innuendoes, not in the original, but in the translation. 3 Chit. Crim. Law, 882; Odg. Lib. & S. 626; Rex *v.* Peltier, 28 Howell St. Tr. 529; Damarest *v.* Haring, 6 Cow. 76; Zenobio *v.* Axtell, 6 T. R. 162, 163. There is, in the civil action for oral slander, a doctrine of the common law requiring an averment, when the words are not in English, that they were understood by the hearers. Wormouth *v.* Cramer, 3 Wend. 394; Amann *v.* Damm, 8 C. B. N. S. 597; Gibs *v.* Jenkins, Hob. 191 *a*; Fleetwood *v.* Curley, Hob. 267 *b*, 268 *a*; Jones *v.* Davers, Cro. Eliz. 496; Price *v.* Jenkings, Cro. Eliz. 865. See Kiene *v.* Ruff, 1 Iowa, 482. But I think it has never been applied to the indictment for a criminal libel; nor, in principle, does it seem to be applicable generally, though in special circumstances it might be. In the indictment in Rex *v.* Peltier, supra, the form of these averments seems to have been judicious; namely, —

"A most scandalous and malicious libel in the French language, of and concerning the said X; that is to say, one part thereof to the tenor following, to wit [here reciting the French words], and in another part thereof to the tenor following, that is to say [reciting the French words], and in another part to the tenor following, that is to say [reciting the French words]; which said scandalous and malicious words in the French language first above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say [setting forth the translation, accompanied by the innuendoes], and which said scandalous and malicious words in the French language secondly above-mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say [proceeding with the translation and innuendoes], and which said scandalous and malicious matters in the French language last above-mentioned and set forth, being translated into English, are as follows, that is to say [setting out the translation and innuendoes]."

And compare with ante, § 460. Proof of the translation is made at the trial by witnesses acquainted with both languages. And the defendant, when he chooses, meets the government's testimony on this point, the same as on any other, by counter evidence. See the cases above referred to, and the places cited in Crim. Proced.

[4] For forms and precedents, see Crim. Proced. II. § 783; Archb. Crim. Pl. & Ev.

§ 620. **Libel on Private Person — (Common Form).** — The ordinary English forms have been gradually shedding their superfluous maledictions and other useless matter, but the process is difficult and slow, and hitherto it is only in part accomplished.[1]

19th ed. 827, 839, 915; 2 Chit. Crim. Law, 42–47, 52, 54, 86–94, 99; 3 Ib. 877 *b*–900, 902, 911, 914; 4 Went. Pl. 199–213, 407–417; 6 Ib. 449; Trem. P. C. 43–58, 68–72; Rex *v.* Thompson, 8 Howell St. Tr. 1359; Rex *v.* Barnardiston, 9 Howell St. Tr. 1334; Rex *v.* Fuller, 14 Howell St. Tr. 518, 526; Rex *v.* Tutchin, 14 Howell St. Tr. 1095; Rex *v.* Owen, 18 Howell St. Tr. 1203; Rex *v.* Wilkes, 19 Howell St. Tr. 1381; Rex *v.* Almon, 20 Howell St. Tr. 803; Rex *v.* Gordon, 22 Howell St. Tr. 175; Rex *v.* Gordon, 22 Howell St. Tr. 213; Rex *v.* Stockdale, 22 Howell St. Tr. 237, 239; Rex *v.* Duffin, 22 Howell St. Tr. 318; Rex *v.* Eaton, 22 Howell St. Tr. 786; Rex *v.* Lambert, 22 Howell St. Tr. 954, 958; Rex *v.* Rowan, 22 Howell St. Tr. 1034; Rex *v.* Holt, 22 Howell St. Tr. 1190, 1199; Rex *v.* Eaton, 23 Howell St. Tr. 1013; Rex *v.* Reeves, 26 Howell St. Tr. 530; Rex *v.* Finerty, 26 Howell St. Tr. 901, 923; Rex *v.* Vint, 27 Howell St. Tr. 627; Rex *v.* Cuthell, 27 Howell St. Tr. 642; Rex *v.* Wakefield, 27 Howell St. Tr. 679; Rex *v.* Peltier, 28 Howell St. Tr. 529, 2 Chit. Crim. Law, 52; Rex *v.* Cobbett, 29 Howell St. Tr. 2; Rex *v.* Draper, 30 Howell St. Tr. 959, 980, 1347; Rex *v.* Hart, 30 Howell St. Tr. 1131; Rex *v.* Lambert, 31 Howell St. Tr. 335; Rex *v.* Drakard, 31 Howell St. Tr. 495, 536; Rex *v.* Fitzpatrick, 31 Howell St. Tr. 1170; Rex *v.* Hatchard, 32 Howell St. Tr. 674; Rex *v.* Horne, Cowp. 672, 20 Howell St. Tr. 651; Rex *v.* Shipley, 4 Doug. 73, 74, 21 Howell St. Tr. 847, 876; Rex *v.* Creevey, 1 M. & S. 273; Rex *v.* Marsden, 4 M. & S. 164; Rex *v.* Sutton, 4 M. & S. 532; Rex *v.* Topham, 4 T. R. 126; Reg. *v.* Gregory, 8 Q. B. 508; Gregory *v.* Reg. 15 Q. B. 957, 5 Cox C. C. 247; Reg. *v.* Newman, 1 Ellis & B. 558, Dears. 85; Reg. *v.* Bradlaugh, 2 Q. B. D. 569, 3 Q. B. D. 607; Rex *v.* Holt, 2 Leach, 4th ed. 593, 5 T. R. 436; Rex *v.* Lee, 5 Esp. 123; Rex *v.* Lambert, 2 Camp. 398; Rex *v.* Fisher, 2 Camp. 563; Reg. *v.* Collins, 9 Car. & P. 456; Gathercole's Case, 2 Lewin, 237; Reg. *v.* Mitchel, 3 Cox C. C. 1, 8, note; Martin *v.* Reg. 3 Cox C. C. 318, 321; Reg. *v.* Duffy, 4 Cox C. C. 294, 296; Reg. *v.* Yates, 12 Cox C. C. 233; Reg. *v.* Labouchere, 14 Cox C. C. 419; Reg. *v.* Wilkinson, 42 U. C. Q. B. 492.

Alabama. — Reid *v.* The State, 53 Ala. 402.

Georgia. — Taylor *v.* The State, 4 Ga. 14; Giles *v.* The State, 6 Ga. 276.

Illinois. — Clay *v.* People, 86 Ill. 147, 148; McNair *v.* People, 89 Ill. 441; Crowe *v.* People, 92 Ill. 231.

Louisiana. — The State *v.* Willers, 27 La. An. 246.

Massachusetts. — Commonwealth *v.* Buckingham, 2 Wheeler Crim. Cas. 181; Commonwealth *v.* Holmes, 17 Mass. 336; Commonwealth *v.* Child, 13 Pick. 198; Commonwealth *v.* Snelling, 15 Pick. 321; Commonwealth *v.* Wright, 1 Cush. 46; Commonwealth *v.* Tarbox, 1 Cush. 66; Commonwealth *v.* Varney, 10 Cush. 402.

Michigan. — People *v.* Girardin, 1 Mich. 90.

Missouri. — The State *v.* Boogher, 3 Misso. Ap. 442.

New York. — People *v.* Simons, 1 Wheeler Crim. Cas. 339, 340; People *v.* Croswell, 3 Johns. Cas. 337; People *v.* Hallenbeck, 2 Abb. N. Cas. 66.

North Carolina. — The State *v.* Haney, 1 Hawks, 460; The State *v.* White, 6 Ire. 418.

Pennsylvania. — Cobbett's Case, Whart. St. Tr. 322, 326.

Rhode Island. — The State *v.* Corbett, 12 R. I. 288.

South Carolina. — The State *v.* Henderson, 1 Rich. 179.

Tennessee. — Melton *v.* The State, 3 Humph. 389.

Texas. — Morton *v.* The State, 3 Texas Ap. 510.

Vermont. — The State *v.* Atkins, 42 Vt. 252.

Virginia. — Commonwealth *v.* Morris, 1 Va. Cas. 176.

Wisconsin. — Chittenden *v.* The State, 41 Wis. 285.

[1] Crim. Proced. II. § 783.

Therefore at present in England, what appears to be the common method of charging a libel on a private person is to say, —

That A, &c. on, &c. at, &c.[1] [contriving, and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice one X, and to deprive him of his good name, fame, credit, and reputation, and to bring him into great contempt, scandal, infamy, and disgrace [2]], unlawfully, wickedly, and maliciously did write and publish [and cause and procure to be written and published [3]], a false, scandalous, malicious, and defamatory libel [here, if the pleader chooses, he can add "in the form of," &c. saying whether it was a letter, book, pamphlet, newspaper article, or whatever else it was [4]], containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said X, and of and concerning, &c. [here insert such of the subjects of the libel as it may be necessary to refer to by the innuendoes, in setting out the libel], according to the tenor and effect following, that is to say [here set out the libel, together with such innuendoes as may be necessary to render it intelligible]; [he the said A then and

[1] For some years past, it has been the custom in England, authorized by statute (Crim. Proced. I. § 368, 385), to omit from the body of the indictment the allegation of place. But where I copy an English precedent for American use, I restore this averment.

[2] **Intent, and alleging it.** — If the specific intent, thus set out, were an element in the offence, without which it could not be, the rules of pleading would require it to be alleged. Ante, § 552–556; Crim. Proced. I. § 523. But, to constitute a criminal libel of this sort no such specific intent is essential in law, Crim. Law, II. § 922, 923; therefore the indictment need charge none. Crim. Proced. I. § 521–525. Hence, and for other reasons, we may deem this matter in brackets unnecessary. Crim. Proced. II. § 783. The malice which the law does require, is averred in the subsequent parts of this form. Still, in the language of a late English writer (Odgers on Libel and Slander, 575, 576), "in some few cases it is necessary to aver a special intent. Thus, where a letter is sent direct to the prosecutor, and published to no one else, an intention to provoke the prosecutor and to excite him to a breach of the peace must be alleged. An allegation that it was sent with intent to injure, prejudice, and aggrieve him in his profession and reputation cannot, in such a case, be supported. Rex *v.* Wegener, 2 Stark. 245. So, where a letter containing a libel on a married man is sent to the wife, 'it ought to be alleged as sent with intent to disturb the domestic harmony of the parties.' Ib. So, in the case of a libel on a person deceased, an intent should be alleged to bring contempt and scandal on his family and relations and to provoke them to a breach of the peace. Rex *v.* Topham, 4 T. R. 126." One objecting to this passage might, looking into these cases, say of each of them, that the indictment charged a specific, but not the right specific, intent, and argue that, in such circumstances, the prosecutor is bound by the allegation, however needlessly made, and on this view the case proceeded. Now, not saying what weight, or whether any, such an argument ought to have, I cannot doubt the correctness of the general doctrine thus developed by the English writer. I should state it to be, that, where a special intent is necessary to a *prima facie* case of legal guilt, it must be alleged. But where the acts set out are indictable when done of mere general malice, no averment of a special purpose or intent beyond, which need not be proved, can be required consistently with the rules of criminal pleading.

[3] Unnecessary, and better omitted. Ante, § 139 and note, and the places there referred to.

[4] I have made this statement more full than it is in the English book.

there well knowing the said defamatory libel to be false;[1] to the great damage, scandal, and disgrace of the said X, to the evil example of all others in the like case offending[2], and against the peace, &c.[3]

§ 621. **Seditious Libel — (On Government).** — During a considerable period in the history of our English ancestors, the libels most prosecuted were those called seditious; tending, it was supposed, to create disaffection to the government, and leading to treason. How much of the old law of sedition is incorporated into our American common law[4] this is not the place to inquire. While the word "sedition" is seldom upon the lips of an American lawyer, and in England the law itself appears to be modified by changed conditions and opinions, and prosecutions under it are not numerous,[5] there is, not only there, but also here, yet apparently more modified, such a common-law offence recognized as a libel on the government.[6] The following is a form for the indictment employed more than a hundred years ago, sustained by unanimous opinions in the King's Bench and on appeal in the House of Lords, and still preserved as the model in the English books of practice. To Americans it is interesting, likewise, as reminding us of the birth of our nation: —

That A, &c. [being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our Lord the King, and to his administration of the government of this kingdom, and the dominions thereunto belonging[7]], [and wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontents and seditions amongst his Majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his Majesty's subjects from his said Majesty, and cause it to be believed that divers of his Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops, in the province, colony, or plantation of the Massachusetts Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his Majesty's subjects in the said province, colony, or plantation, to resist and oppose his Majesty's government[8]],

[1] Unnecessary. Ante, § 619, note.

[2] Unnecessary. Ante, § 48; Crim. Proced. II. § 783.

[3] Archb. Crim. Pl. & Ev. 10th ed. 612, 613, 19th ed. 915.

[4] Crim. Law, I. § 457.

[5] 2 Steph. Hist. Eng. Crim. Law, 298 et seq.

[6] Crim. Law, II. § 941, 942.

[7] Unnecessary. Ante, § 45, 46.

[8] So far as the matter in these brackets alleges a special intent, in addition to the general malicious and seditious one averred further on, I see no reason for deeming it material. Nor can I discover an absolute necessity for it in any other view. That the allegation of a special intent was surplusage, certainly that the jury were not required to and did not pass upon it, is evident from the instructions which the court,

on, &c. [with force and arms [1]], at, &c. wickedly, maliciously, and seditiously did write and publish [and cause and procure to be written and published [2]] a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning his said Majesty's government and the employment of his troops, according to the tenor and effect following; that is to say, "King's Arms Tavern, Cornhill, June 7, 1775. At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his said Majesty's) troops at or near Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts Bay, in New England, in America), on the nineteenth of last April; which sum being immediately collected, it was thereupon resolved, that Mr. Horne (meaning himself, the said A) do pay to-morrow into the hands of Messrs. Brown & Collison, on account of Dr. Franklin, the said sum of one hundred pounds, and that Dr. Franklin be requested to apply the same to the above-mentioned purpose. John Horne" (meaning himself, the said A); [in contempt of our said Lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending [3]], and against the peace, &c.[4]

Lord Mansfield, gave the jury. Rex *v.* Horne, 20 Howell St. Tr. 651, 759. In Rex *v.* Philipps, 6 East, 464, 473, Lord Ellenborough mentions this allegation as being beyond question sufficient, but he does not say the others were not suffieient without it. And see note to the last section. See also the proceedings in arrest of judgment in Rex *v.* Shipley, 21 Howell St. Tr. 847, 1041–1044.

[1] Needless. Ante, § 43.

[2] Not necessary, and better omitted. Ante, § 139, note, and places there referred to.

[3] Unnecessary. Ante, § 48; Crim. Proced. I. § 647.

[4] Archb. Crim. Pl. & Ev. 10th ed. 523, 19th ed. 827; 2 Chit. Crim. Law, 90, from Rex *v.* Horne, Comp. 672, 20 Howell St. Tr. 651. There were other counts in this indictment, but they are not material to the present purpose. For other precedents for seditious libel, see 2 Chit. Crim. Law, 86–94; Rex *v.* Eaton, 4 Went. Pl. 199; Rex *v.* Nevill, Trem. P. C. 43; Rex *v.* Baxter, Trem. P. C. 45; Rex *v.* Williams, Trem. P. C. 48; Rex *v.* Barnadiston, Trem. P. C. 55; Rex *v.* Duffin, 22 Howell St. Tr. 318; Rex *v.* Eaton, 22 Howell St. Tr. 786; Rex *v.* Lambert, 22 Howell St. Tr. 954, 958; Rex *v.* Rowan, 22 Howell St. Tr. 1034; Rex *v.* Holt, 22 Howell St. Tr. 1190, 1199; Rex *v.* Eaton, 23 Howell St. Tr. 1013; Rex *v.* Reeves, 26 Howell St. Tr. 530; Rex *v.* Finerty, 26 Howell St. Tr. 901, 923; Rex *v.* Cuthell, 27 Howell St. Tr. 642; Rex *v.* Wakefield, 27 Howell St. Tr. 679; Rex *v.* Lambert, 31 Howell St. Tr. 335, 2 Camp. 398; Rex *v.* Shipley, 4 Doug. 73, 21 Howell St. Tr. 847, 876; Rex *v.* Sutton, 4 M. & S. 532; Rex *v.* Holt, 2 Leach, 4th ed. 593, 5 T. R. 436; Reg. *v.* Collins, 9 Car. & P. 456; Reg. *v.* Mitchell, 3 Cox C. C. 1, 8, note; Martin *v.* Reg. 3 Cox C. C. 318, 321; Reg. *v.* Duffy, 4 Cox C. C. 294, 296.

§ 622. **On Judge and Jury.**[1] — A common English form, modified for American use, is, —

That heretofore, at a court of, &c. on, &c. at, &c. the Honorable X, one of the justices of the said court presiding, a certain issue duly joined in the said court between one M and one N, in a certain action on promises [*or*, complaint in equity, *or*, &c. stating what], in which the said M was plaintiff, and the said N defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly sworn, and taken between the parties aforesaid. Whereupon A, &c. [being a wicked and ill-disposed person[2]], [wickedly and maliciously contriving and intending to bring the administration of justice in this State into contempt, and to scandalize and vilify the said Honorable X, and the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that, &c. (giving here the effect of the libel)[3]], on, &c. [with force and arms[4]] at, &c. wickedly and maliciously did write and publish [and cause and procure to be written and published[5]] a certain false, wicked, malicious, and scandalous libel, of and concerning the administration of justice in this State, and of and concerning the trial of the said issue, and of and concerning the said Honorable X and the jurors by whom the said issue was so tried as aforesaid, according to the tenor and effect following; that is to say [here set out the libel, together with such innuendoes as may be requisite]; [to the great scandal and reproach of the administration of justice in this State, in contempt of the laws, to the evil example of all others in like case offending[6]], and against the peace, &c.[7]

§ 623. **On other Official Persons.** — The foregoing forms sufficiently indicate how the indictment for libels on other official persons should be drawn.[8]

[1] Crim. Law, II. § 936; Crim. Proced. II. § 797.

[2] Unnecessary. Ante, § 46.

[3] The matter between these brackets is believed also to be unnecessary, as see the notes to the last two sections. And if the effect of the libel is stated here, may it not be required to be proved as laid, to avoid a variance, after the manner of the troublesome purport clause in the old forms for forgery? See ante, § 456, 463 and note, 470. At all events, if the pleader follows the direction in the text, let him weigh his words accurately, and be cautious in their use.

[4] Not necessary. Ante, § 43.

[5] Better omitted. Ante, § 139 and note, and places there referred to.

[6] It is believed that none of this is necessary. Ante, § 48. Crim. Proced. I. § 647.

[7] Archb. Crim. Pl. & Ev. 10th ed. 588, 19th ed. 898. For another precedent, see Rex *v.* Hart, 30 Howell St. Tr. 1131; and for a similar offence, Rex *v.* Barnardiston, 9 Howell St. Tr. 1334. For a libel on the judges, 3 Chit. Crim. Law, 878; 4 Went. Pl. 414. On justices of the peace, 4 Went. Pl. 407; 3 Chit. Crim. Law, 898; Commonwealth *v.* Snelling, 15 Pick. 321. On a juror, Commonwealth *v.* Wright, 1 Cush. 46.

[8] For precedents, see Rex *v.* Cobbett, 29 Howell St. Tr. 2; Rex *v.* Marsden, 4 M. & S. 164. On the king, 3 Chit. Crim. Law, 877 *b*; 4 Went. Pl. 201. On high officer of government, Rex *v.* Fitzpatrick, 31 Howell St. Tr. 1170. On House of Commons, Rex *v.* Stockdale, 22 Howell St. Tr. 237, 239. On chancellor of exchequer, peers, bishops, and commons, 2

§ 624. **Forms varying with Reasons.** — The pleader should bear in mind, that libel is not an offence resting on a single reason, but that the different sorts of libel are founded each upon its special reason. Thus, a libel on a private person is indictable because it tends to excite his wrath and lead to a breach of the peace;[1] a seditious libel, because it may weaken respect for the government and bring on treason;[2] an obscene libel, because of its tendency to corrupt the public morals.[3] Now, before one draws an indictment, he should distinctly mark out in his mind the reason on which he will expect the court to hold the particular libel to be indictable. Then, if he elects to charge the special intent, as considered in some of the foregoing notes,[4] he must, if his allegation is to be anything more than surplusage, which must be rejected at the trial or he will be defeated for the variance, set out the particular intent upon which the law founds the indictability of the particular libel, — not, for example, lay the defendant's purpose in an obscene libel to have been to provoke some person named to a breach of the peace, or to alienate the subjects from the government; or his intent in a libel on an individual to have been to corrupt the public morals.[5] And he will not require special instructions to discern how the distinction will vary the other parts of the allegations. To return, then, to what is set down in a foregoing note,[6] —

§ 625. **On the Dead.** — A dead man cannot break the peace. Therefore to charge one with a libel upon him, in like terms as though he were living, amounts to no allegation of an offence. And it does not help the matter simply to aver, that the defendant did it "wickedly and maliciously contriving and intending to injure, defame, disgrace, and vilify the memory, reputation, and character" of the deceased person.[7] The safe way, not undertaking to say whether anything short will suffice, is to mention by name one or more living persons connected, in a manner pointed out, with the one who is dead, and allege that the defendant did it to excite the living to break the peace; as, —

Chit. Crim. Law, 99. On a sheriff, Commonwealth *v.* Morris, 1 Va. Cas. 176.

[1] Crim. Law, I. § 591; II. § 907–909.

[2] Ante, § 621.

[3] Crim. Law, I. § 591; II. § 910.

[4] Ante, § 620–622.

[5] Obvious as this proposition is, an examination of the precedents will show that large numbers of them were constructed in disregard of it; that is, will confirm what I have before said, that they contain large proportions of surplusage.

[6] Ante, § 620, note.

[7] Rex *v.* Topham, 4 T. R. 126. And see Crim. Law, II. § 939, 940.

That, before the publishing of the false, scandalous, and malicious libel hereinafter set out, Y was the wife of X and died, leaving the said X surviving; whereupon A, &c. on, &c. after the decease of the said Y, at, &c. maliciously devising and intending to vilify and bring into contempt and disgrace the memory of the said Y, deceased, and to excite, induce, tempt, and cause the said X, and all other persons who in the lifetime of the said Y, deceased, were connected with her in affinity, in blood, in friendship, and otherwise, whose respective names and such former relationships to the said Y deceased are to the jurors unknown, to commit breaches of the peace, and otherwise to stir up disorder among the people, did falsely, maliciously, unlawfully, and scandalously write and publish, of and concerning the said Y in her lifetime, and of and concerning the memory of the said Y, deceased, a false, scandalous, and malicious libel of the tenor following [here setting it out with the proper innuendoes]; against the peace, &c.[1]

§ 626. **Obscene Libel.**[2] — If the indictment is on a statute, it should cover the statutory terms. At common law, or on a statute which it does thus cover, it may aver, —

That A, &c. on, &c. at, &c. did, in violation of public decency, to the debasement of the public morals, and especially to the corruption of the morals and manners of all children and youth, maliciously, lasciviously, corruptly, scandalously, and obscenely write and publish [of and concerning, &c. *when necessary*[3]] a malicious, lascivious, corrupting, scandalous, and obscene libel of the tenor following [here setting it out in exact words, with any required innuendoes; *or*, write and publish, in the form of a book called, &c. (and in particular did maliciously, scandalously, and obscenely deliver a copy of the said libel and book to one X[4]), one part whereof is of the tenor following, &c. *or*, which said libel is so filthy, nasty, corruptingly obscene, and disgusting that its tenor is not fit to be set down in these allegations, and the jurors cannot recite the tenor thereof[5]]; against the peace, &c.[6]

[1] I have drawn this form in a measure after the precedent in 3 Chit. Crim. Law, 914, retaining all of it which any one would be likely to deem in any degree important; also strengthening it a little by additions. It was an information in the King's Bench, and Chitty says the "defendants were convicted, fined, and imprisoned" thereon. And see the inadequate form in Rex *v.* Topham, supra.

[2] Crim. Law, I. § 591; II. § 910, 943; Crim. Proced. II. § 790, 794 *a*.

[3] Crim. Proced. II. § 786, 793, 794.

[4] Where the publication was to an individual, this averment is, at least, highly proper. Commonwealth *v.* Holmes, 17 Mass. 336.

[5] Crim. Proced. I. § 496; II. § 790.

[6] The above is a sort of reproduction of the various precedents, when compared with one another and with the principles which govern this indictment. For precedents, see 2 Chit. Crim. Law, 42, 44; 3 Ib. 887 (advertisement by a married woman offering to become a mistress), 902; 4 Went. Pl. 203; Reg. *v.* Bradlaugh, 2 Q. B. D. 569, 3 Q. B. D. 607; Commonwealth *v.* Holmes, supra; Commonwealth *v.* Tarbox, 1 Cush. 66; People *v.* Hallenbeck, 2 Abb. N. Cas. 66; People *v.* Girardin,

§ 627. **Other Forms** — are so readily constructed from the foregoing that it is deemed best not to proceed further with this part of the chapter; except by referring, in the notes, to places where particular precedents may be found.[1]

II. *By Signs, Pictures, and Effigies.*

§ 628. **Compared with last Sub-title.** — In the nature of words, they can only describe an effigy or a picture, they cannot set out its *tenor*. So the forms under this sub-title must, in this particular, differ from those under the last. But if, connected with an effigy or picture, there are explanatory words, no reason appears why their tenor should not be given; though, in fact, not all the precedents are drawn after this suggestion. In other respects, the indictment under this sub-title is similar to that under the last.[2]

§ 629. **Formula.** — The form of the indictment, subject to be varied by the terms of a statute, or the nature of the particular libel, may be, —

That A, &c. on, &c. at, &c. devising and intending to bring one X into contempt and disgrace, and to excite and cause him and others to commit public disorders and breaches of the public peace, then and there unlawfully and maliciously did, in and beside a certain highway whereon great numbers of people were continually passing and going, erect a rude structure partly in the form of and suggesting a gallows, and thereon hang a ludicrous effigy in rude resemblance of a man, a rope being around the neck thereof, and the said effigy being thus and otherwise in the posture of a convicted man undergoing capital punishment for crime, and did then and there unlawfully and maliciously, above said effigy, write, print, and

1 Mich. 90; McNair *v.* People, 89 Ill. 441.

[1] On a foreign minister, 2 Chit. Crim. Law, 54; 3 Ib. 882; 4 Went. Pl. 410. On the king of Spain, Cobbett's Case, Whart. St. Tr. 322, 326. On the emperor of Russia, Rex *v.* Vint, 27 Howell St. Tr. 627. On Napoleon Bonaparte, first consul of France, Rex *v.* Peltier, 28 Howell St. Tr. 529, 2 Chit. Crim. Law, 52. On the queen of France and the French embassador, Rex *v.* Gordon, 22 Howell St. Tr. 213. On the Russian consul, Commonwealth *v.* Buckingham, 2 Wheeler Crim. Cas. 181. As to all the foregoing, see Crim. Proced. II. § 798. On a preacher, 3 Chit. Crim. Law, 899. On a lawyer, 3 Chit. Crim. Law, 884, 894, 895; 4 Went. Pl. 206–213. On a religious order and community, Gathercole's Case, 2 Lewin, 237. Sending a letter to one accusing him of theft, 3 Chit. Crim. Law, 889. Publishing an ex parte examination before magistrate, 3 Chit. Crim. Law, 911. Fixing a scandalous libel to a bridge, Rex *v.* Newton, Trem. P. C. 69. For blasphemous libel, ante, § 241, 243.

[2] Explained Crim. Proced. II. § 794 *a*–796.

publish the words "The Villain X," meaning the aforesaid X, and did then and there unlawfully and maliciously congregate large numbers of people near to and to see the same, and cause the same there to remain thence onward for the space of two days [*or*, devising and intending to corrupt and debauch the public morals, then and there unlawfully, maliciously, scandalously, and obscenely did publish, expose, keep for sale, and sell, in large numbers, a certain lewd, scandalous, corrupting, and obscene picture, representing a naked woman in an obscene, filthy, disgusting, and corrupting posture lying on a bed, and did then and there unlawfully, maliciously, scandalously, and obscenely sell, deliver, and publish one copy of said picture to one X, and other copies in numbers to the jurors unknown to other persons whose names are to the jurors unknown] ; against the peace, &c.[1]

§ 630. **Effigy.** — The following is an English form in modern use for hanging a man in effigy : —

That A, &c. [contriving and unlawfully, wickedly, and maliciously intending to injure, vilify, and prejudice one X, and to deprive him of his good name, fame, credit, and reputation, and to bring him into great contempt, scandal, infamy, and disgrace[2]], on, &c. [with force and arms[3]], at, &c. unlawfully, wickedly, and maliciously did make [and cause and procure to be made[4]] a certain gibbet and gallows, and also a certain effigy or figure intended to represent the said X ; and then and there unlawfully, wickedly, and maliciously did erect, set up, and fix [and cause and procure to be erected, set up, and fixed[5]] the said gibbet and gallows in a certain yard and place near unto a certain common highway there situate, called, &c. and near to a certain ferry called, &c. where the said X was used and accustomed to ply in the way of his trade and business as a waterman ; and then and there unlawfully, wickedly, and maliciously did hang up and suspend [and cause and procure to be hung up and suspended[6]] the said effigy and figure to and upon the said gibbet and gallows, with the name

[1] For precedents, see, —

Hanging in Effigy. — 3 Chit. Crim. Law, 908–911 ; 4 Went. Pl. 205.

Drowning in Effigy. — 3 Chit. Crim. Law, 905.

Exhibiting Effigies — at windows and drawing a crowd, Rex *v.* Carlile, 6 Car. & P. 636.

Obscene Pictures, &c. — 2 Chit. Crim. Law, 42, 44, 46 ; 3 Ib. 902, 904 ; Rex *v.* Sabine, 4 Went. Pl. 203 ; Commonwealth *v.* Dejardin, 126 Mass. 46 ; Commonwealth *v.* Sharpless, 2 S. & R. 91 ; Reg. *v.* Carlile, 1 Cox C. C. 229.

Indecent Show. — Knowles *v.* The State, 3 Day, 103 ; Reg. *v.* Saunders, 1 Q. B. D. 15, 13 Cox C. C. 116.

Other Libels by Pictures. — 3 Chit. Crim. Law, 900 ; The State *v.* Powers, 12 Ire. 5.

Procuring — obscene prints with intent to publish them. Dugdale *v.* Reg. 1 Ellis & B. 435, Dears. 64.

[2] If the matter in these brackets is to be retained, it is believed that the form of it suggested in our formula (ante, § 629) should be preferred. As to which, see ante, § 620, note, 624.

[3] Unnecessary. Ante, § 43.

[4] Better omitted. Ante, § 139 and note, and the places there cited.

[5] Better omitted. See last note.

[6] Better omitted, as above.

of the said X inscribed on a piece of wood and affixed to the said effigy and figure, together with divers scandalous inscriptions and devices affixed upon and about the same, reflecting on the character of the said X;[1] and did then and there keep and continue [and cause and procure to be kept and continued[2]] the said gibbet and gallows, so erected and set up as aforesaid, with the said effigy and figure hung up and suspended to and from the same, as aforesaid, together with the several inscriptions and devices aforesaid, so affixed as aforesaid, for a long space of time, to wit, for the space of four days then next following, and during all that time unlawfully, wickedly, and maliciously did then and there publish and expose the said gibbet and gallows, with the said effigy and figure thereon, to the sight and view of divers good and worthy subjects of our said Lady the Queen [*or*, of this State], passing and repassing in and along the highway aforesaid; [to the great scandal, infamy, and disgrace of the said X, to the evil example of all others in the like case offending[3]]. and against the peace, &c.[4]

§ 631. **Exhibiting Obscene Painting.** —The following is in substance a form adjudged good: —

That A, &c. being an evil-disposed person, and designing, contriving, and intending the morals as well of youth as of divers other citizens of this commonwealth to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on, &c. at, &c. in a certain house there,[5] unlawfully, wickedly, and scandalously did exhibit and show [for money[6]] to persons to the jurors unknown, a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman [to the manifest corruption and subversion of youth, and other citizens of this commonwealth, to the evil example of all others in like case offending[7]], and against the peace, &c.[8]

III. *By Oral Words.*

§ 632. **Elsewhere.** — We have already, under the titles "Blasphemy" and "Contempt of Court," seen in what manner oral words are alleged.[9] Thus, —

[1] See, as to the form of these allegations, ante, § 628, and the formula ante, § 629.

[2] Better omitted, as see above.

[3] Needless. Ante, § 48.

[4] Archb. Crim. Pl. & Ev. 10th ed. 618, 19th ed. 923.

[5] Undoubtedly, if the place is public, it is better so to shape the allegation that such fact will appear.

[6] These words, "for money," are doubtless not essential. Crim. Law, I. § 1086, 1112; Crim. Proced. II. § 108, 274.

[7] A part of this concluding matter is certainly unnecessary, and I can discern no substantial reason for retaining any of it. Ante, § 48; Crim. Proced. I. § 647.

[8] Commonwealth *v.* Sharpless, 2 S. & R. 91. Quite similar is the form in Reg. *v.* Carlile, 1 Cox C. C. 229, for selling bawdy pictures. See post, § 798.

[9] Ante, § 241, 243, 244, 326.

§ 633. **Formula — (Compared with Written Libel).** — The indictment is in all respects the same as for a written libel; except that, in place of the expression "did, &c. publish," &c. it uses language denoting oral words, the tenor whereof it professes to and does set out;[1] as, —

Did maliciously, &c. [employing, if the proceeding is on a statute, the statutory adverbs and other terms], in the presence and hearing of, &c. proclaim, pronounce, and publish the following malicious, &c. words [*or*, if the pleader chooses, he can say "words, &c. of the tenor following." There is no one form of the expression which alone will be adequate. In other respects, the formula for written libel[2] will suffice for this].[3]

§ 634. **In Nature of Contempt — (Spoken to Magistrate).** — The following is a form from the current English books, omitting in large part the surplusage, and slightly modifying it for American use. In some of our States, other modifications will be required, of a sort obvious to the practitioner and readily made: —

That heretofore, on, &c. at, &c. A, &c. was brought before X, esquire, then and yet being one of the justices of the peace in and for said county, assigned to keep the peace and to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county,[4] and then and there was duly charged before the said X, upon the oath of one Y, that he the said A had then lately before feloniously stolen, taken, and carried away divers goods and chattels of the said Y; whereupon the said A afterward, then and there, while the said X as such justice of the peace was examining and taking the depositions of divers witnesses against him the said A in that behalf, did, wickedly and maliciously intending and contriving to scandalize and vilify the said X as such justice of the peace, and

[1] Crim. Proced. II. § 123, 807, 809.

[2] Ante, § 619.

[3] See, for precedents, 2 Chit. Crim. Law, 94–99; 3 Ib. 881, 916; Rex *v.* Colmer, Trem. P. C. 58; Rex *v.* Snow, Trem. P. C. 59; Rex *v.* Edes, Trem. P. C. 61; Rex *v.* Wetwang, Trem. P. C. 64; Rex *v.* Sorocold, Trem. P. C. 64; Rex *v.* Harris, Trem. P. C. 65; Rex *v.* Harvey, Trem. P. C. 66; Rex *v.* Barbone, Trem. P. C. 73; Rex *v.* Price, Trem. P. C. 75; Rex *v.* Nosworthy, Trem. P. C. 75; Rex *v.* Vavasour, Trem. P. C. 79; Rex *v.* Forth, Trem. P. C. 80; Rex *v.* Elliot, 3 Howell St. Tr. 293; Reg. *v.* Hathaway, 14 Howell St. Tr. 639; Rex *v.* Frost, 22 Howell St. Tr. 471; Rex *v.* Briellat, 22 Howell St. Tr. 909; Rex *v.* Binns, 26 Howell St. Tr. 595; Rex *v.* Spiller, 2 Show. 207; Rex *v.* Benfield, 2 Bur. 980; Reg. *v.* O'Neill, 1 Car. & K. 138.

Alabama. — Haley *v.* The State, 63 Ala. 83; Haley *v.* The State, 63 Ala. 89; Yancy *v.* The State, 63 Ala. 141, 142; Henderson *v.* The State, 63 Ala. 193.

Arkansas. — The State *v.* Lancaster, 36 Ark. 55.

California.—Ex parte Foley, 62 Cal. 508.

Indiana. — The State *v.* Burrell, 86 Ind. 313.

North Carolina. — The State *v.* Aldridge, 86 N. C. 680.

Tennessee. — Bell *v.* The State, 1 Swan, Tenn. 42.

Texas. — Lagrone *v.* The State, 12 Texas Ap. 426; McMahan *v.* The State, 13 Texas Ap. 220.

[4] See post, § 682.

to bring the administration of justice in this State into contempt, wickedly and maliciously, in the presence and hearing of divers good people there assembled, publish, utter, pronounce, declare, and say, with a loud voice to the said X, and whilst he the said X was so acting as such justice as aforesaid, "You are a scoundrel and a liar; you would hang your own father if you could make a groat by his execution;" against the peace, &c.[1]

§ 635. **Other Forms.** — For other sorts of this offence the pleader will require only references to places where precedents may be found.[2]

IV. *Practical Suggestions.*

§ 636. **Changed Conditions and Opinions.** — The subject of this chapter is one of those on which popular and judicial opinions have considerably changed since the early periods of our law. And it should be so; for the condition of the people with respect to those things which ought to determine the law is almost revolutionized, it is quite unlike what it formerly was. Hence, —

§ 637. **Seditious Libels,** — if indictable, ought not practically to be prosecuted except when they have reached a flagrancy much beyond the standard which satisfied the attorney for the crown in former times. Political discussions, even when pretty rampant, will not, with us, beget treason; except when falsehoods are propagated, freedom of reply is suppressed, mobs are set upon the opponents of the popular views, and honest-minded

[1] Archb. Crim. Pl. & Ev. 10th ed. 588, 19th ed. 899. For a precedent for orally charging a magistrate with receiving bribes, Rex *v.* Price, Trem. P. C. 75. Perhaps this offence may be also deemed a contempt of the magistrate, indictable on the same principle as under the similar form in ante, § 326. **Spoken of Magistrate, &c.** — There is some doubt to what extent words spoken merely of a magistrate or other official person, in his absence, are indictable under our common law. Crim. Law, II. § 945–947. The English books furnish such precedents as the following: For contemptuous words spoken of a justice of the peace who was endeavoring to suppress a riot, Rex *v.* Barbone, Trem. P. C. 73. For verbal slander on the judges of the higher courts, Rex *v.* Nosworthy, Trem. P. C. 75; Rex *v.* Vavasour, Trem. P. C. 79. Slandering grand jury, Rex *v.* Spiller, 2 Show. 207. Words reflecting on a jury and its verdict, Rex *v.* Forth, Trem. P. C. 80.

[2] **Obscene Words — Slander of Female** — as to chastity, and the like, chiefly under statutes, The State *v.* Burrell, 86 Ind. 313; Henderson *v.* The State, 63 Ala. 193; The State *v.* Lancaster, 36 Ark. 55; Bell *v.* The State, 1 Swan, Tenn. 42; Yancy *v.* The State, 63 Ala. 141, 142; Haley *v.* The State, 63 Ala. 89; Haley *v.* The State, 63 Ala. 83; Ex parte Foley, 62 Cal. 508; Lagrone *v.* The State, 12 Texas Ap. 426; McMahan *v.* The State, 13 Texas Ap. 220; The State *v.* Aldridge, 86 N. C. 680. **Singing Songs** — in street, Rex *v.* Benfield, 2 Bur. 980. **Witch,** — slandering one as being a, to take away her life, Reg. *v.* Hathaway, 14 Howell St. Tr. 639.

persons find it difficult or impossible to ascertain the truth. When such a point is reached, the nation stands on the very crumbling edge of danger. Then, as an abstract question, the whole power of the law should be called out. But almost as of course the prosecuting officer is of the majority, and he will not bring indictments; or, if he does, the juries will not return verdicts of guilty. While, therefore, we have not reached this point, let every uprising of mobs be suppressed, and let every offender against the rights of minorities be made to suffer the full force of the law.

§ 638. **Other Libels** — should be prosecuted only when they violate the spirit of the law as well as the letter. Has the offender meant mischief? Has he done it? Will good result from the prosecution? In our country, in the present age, there are no uses for martyrs. So it scarcely pays to punish one for libel when the chief result will be to make a martyr of him.

§ 639. **Manner of Defence — (Pleading Truth).** — As a practical question for the defendant's counsel, he should avoid setting up the truth of the libel,[1] except after becoming quite sure of his ability to prove it. And before offering the client's belief of it in mitigation, he should be careful to see that it really does mitigate. In England, one who relies on the truth in defence must plead it specially, it not being receivable under the plea of not guilty; for the terms of the statute are so.[2] The author is not aware that any of the provisions in our States, permitting the truth in evidence, are thus expressed. In general, at least, such evidence is given under the plea of not guilty. But the practitioner should see how it is in his own State.

[1] Crim. Law, II. § 918–921.

[2] 6 & 7 Vict. c. 96, § 6; Reg. *v.* Latimer, 15 Q. B. 1077. For Forms of the Plea, — see Reg. *v.* Newman, 1 Ellis & B. 558; Reg. *v.* Duffy, 2 Cox C. C. 45; 3 Cox C. C. App. 38; Reg. *v.* Moylan, 19 U. C. Q. B. 521.

CHAPTER LI.

LIQUOR KEEPING AND SELLING.[1]

§ 640. **Elsewhere — (Nuisance).** — The statutory offence of liquor nuisance, consisting of keeping a place for the unlicensed retailing of intoxicating drinks, is, in this volume, put with other nuisances under the general title "Nuisance."[2]

§ 641. **In this Chapter,** — by reason of the great diversities of statutes, we shall not attempt to consider minutely the form of allegation upon every statutory expression; but, collecting some representative expressions, shall endeavor to make such expositions of forms as will enable the pleader to proceed on any which may arise in practice.

§ 642. **Formula for Indictment.** — A mere skeleton for the formula will suffice; because, in subsequent forms, the filling up will appear. It may be, —

That A, &c. [ante, § 74–77], on, &c. [ante, § 80, *and*, if the offence is continuing, and is to be so alleged, introduce one of the forms at ante, § 83, and see § 84; *or*, if the transaction is indictable by reason of its having been on a special day, such as election day or Sunday, follow the directions ante, § 85], at, &c. [ante, § 80], did, without any license or[3] authority therefor,[4] own and possess, &c. [*or*, sell, &c. to, &c. (ante, § 79); *or*, &c.

[1] For the direct expositions of these offences, with the pleading, practice, and evidence, see Stat. Crimes, § 983–1058. Incidental, Crim. Law, I. § 318, 366, 493, 505, 658, 686, 688, 761, 782, 833–835, 957, 1065; II. § 781; Crim. Proced. I. § 100, 103, 107, 108, 241, 402, 436, 452, 469, 479, 484, 512, note, 514, 548, 587–589, 624, 636, 638, 641, 645, 999, 1173, 1174; Stat. Crimes, § 36, 84 *a*. 126, 143, 156, 223, 237, 238.

[2] Post, § 817–822.

[3] **"Or."** — This is one of those negative averments wherein the conjunction "or," not "and," is correct. Ante, § 97, 124, 420, 514, 569, and the notes thereto; Crim. Proced. I. § 591; Stat. Crimes, § 1043.

[4] **Negativing License.** — This negative averment may be in general terms, not necessarily reproducing the statutory words, or descending to the minuteness required in the affirmative allegations. And it is practically better so; because thus all danger of omitting, in the negation, any special form of license is avoided. Crim. Proced. I. § 641; Stat. Crimes, § 1042–1044.

setting out the offence in the statutory terms and with due particularization]; against the peace, &c. [ante, § 65–69].[1]

[1] For precedents, see 3 Chit. Crim. Law, 672; Reg. *v.* Faulkner, 26 U. C. Q. B. 529; Reg. *v.* French, 34 U. C. Q. B. 403; Reg. *v.* Denham, 35 U. C. Q. B. 503; Reg. *v.* Taylor, 36 U. C. Q. B. 183, 217.

Alabama. — The State *v* Raiford, 7 Port. 101; Worrell *v.* The State, 12 Ala. 732; Lodano *v.* The State, 25 Ala. 64; Dorman *v.* The State, 34 Ala. 216; Bryan *v.* The State, 45 Ala. 86; Espy *v.* The State, 47 Ala. 533; Harris *v.* The State, 50 Ala. 127; Lemons *v.* The State, 50 Ala. 130; Hafter *v.* The State, 51 Ala. 37; Weed *v.* The State, 55 Ala. 13; Raisler *v.* The State, 55 Ala. 64; Lawson *v.* The State, 55 Ala. 118; Watson *v.* The State, 55 Ala. 158; Atkins *v.* The State, 60 Ala. 45; Tatum *v.* The State, 63 Ala. 147; Block *v.* The State, 66 Ala. 493.

Arkansas. — Hensley *v.* The State, 1 Eng. 252; Ramsey *v.* The State, 6 Eng. 35; The State *v.* Parnell, 16 Ark. 506; The State *v.* Brandon, 28 Ark. 410; The State *v.* Clayton, 32 Ark. 185; The State *v.* Martin, 34 Ark. 340; The State *v.* Emerick, 35 Ark. 324; Wilson *v.* The State, 35 Ark. 414; Williams *v.* The State, 35 Ark. 430; Erb *v.* The State, 35 Ark. 631; Redmond *v.* The State, 36 Ark. 58; Hale *v.* The State, 36 Ark. 150; Cloud *v.* The State, 36 Ark. 151; Blackwell *v.* The State, 36 Ark. 178; Johnson *v.* The State, 37 Ark. 98; Lane *v.* The State, 37 Ark. 272; Thompson *v.* The State, 37 Ark. 408.

Connecticut. — Whiting *v.* The State, 14 Conn. 487; Barth *v.* The State, 18 Conn. 432; Rawson *v.* The State, 19 Conn. 292; Barnes *v.* The State, 19 Conn. 398, 20 Conn. 232; The State *v.* Corrigan, 24 Conn. 286; The State *v.* Miller, 24 Conn. 522; The State *v.* Powers, 25 Conn. 48.

Georgia. — Elkins *v.* The State, 13 Ga. 435; Woody *v.* The State, 32 Ga. 595; Newman *v.* The State, 63 Ga. 533; Reich *v.* The State, 63 Ga. 616.

Illinois. — Weist *v.* People, 39 Ill. 507; Myers *v.* People, 67 Ill. 503; Mapes *v.* People, 69 Ill. 523, 525; McCutcheon *v.* People, 69 Ill. 601, 602; Murphy *v.* People, 90 Ill. 59; Wiedemann *v.* People, 92 Ill. 314.

Indiana. — The State *v.* Jackson, 4 Blackf. 49; Cheezem *v.* The State, 2 Ind. 149; King *v.* The State, 2 Ind. 523; The State *v.* Clark, 3 Ind. 451; Cleaveland *v.* The State, 20 Ind. 444; McCool *v.* The State, 23 Ind. 127; The State *v.* Mondy, 24 Ind. 268; Ihrig *v.* The State, 40 Ind. 422; Farrell *v.* The State, 45 Ind. 371, 372; Brown *v.* The State, 48 Ind. 38; Vanderwood *v.* The State, 50 Ind. 295; The State *v.* Buckner, 52 Iod. 278; The State *v.* Jacks, 54 Ind. 412; The State *v.* Wickey, 54 Ind. 438; Hooper *v.* The State, 56 Ind. 153; Schlicht *v.* The State, 56 Ind. 173; Shaw *v.* The State, 56 Ind. 188; Meier *v.* The State, 57 Ind. 386; The State *v.* Wickey, 57 Ind. 596; The State *v.* Woulfe, 58 Ind. 17; Manvelle *v.* The State, 58 Ind. 63; Dowdell *v.* The State, 58 Ind. 333; Henderson *v.* The State, 60 Ind. 296; Coverdale *v.* The State, 60 Ind. 307; Ruge *v.* The State, 62 Ind. 388; Robinius *v.* The State, 63 Ind. 235; Mitchell *v.* The State, 63 Ind. 276; The State *v.* Zeitler, 63 Ind. 441; Mitchell *v.* The State, 63 Ind. 574; Vannoy *v.* The State, 64 Ind. 447; Stevenson *v.* The State, 65 Ind. 409; Berry *v.* The State, 67 Ind. 222; Arbintrode *v.* The State, 67 Ind. 267; Grupe *v.* The State, 67 Ind. 327; The State *v.* Christman, 67 Ind. 328; Gaust *v.* The State, 68 Ind. 101; Plunkett *v.* The State, 69 Ind. 68; The State *v.* Mulhisen, 69 Ind. 145; Wills *v.* The State, 69 Ind 286; The State *v.* Corll, 73 Ind. 535; Johnson *v.* The State, 74 Ind. 197; Massey *v.* The State, 74 Ind. 368; Klein *v.* The State, 76 Ind. 333; Keiser *v.* The State, 78 Ind. 430, 437; Kurz *v.* The State, 79 Ind. 488; Stoner *v.* The State, 80 Ind. 89; The State *v.* Bunnell, 81 Ind. 315.

Iowa. — Hintermiester *v.* The State, 1 Iowa, 101; Santo *v.* The State, 2 Iowa, 165; The State *v.* Allen, 32 Iowa, 248; The State *v.* Thompson, 44 Iowa, 399; The State *v.* Findley, 45 Iowa, 435; The State *v.* Silhoffer, 48 Iowa, 283; The State *v.* Mohr, 53 Iowa, 261.

Kansas. — Territory *v.* Freeman, McCahon, 56, 57; The State *v.* Thompson, 2 Kan. 432; The State *v.* Muntz, 3 Kan. 383; The State *v.* Volmer, 6 Kan. 379; The State *v.* Kuhuke, 26 Kan. 405; The State *v.* Schweiter, 27 Kan. 499, 501.

Kentucky. — Commonwealth *v.* Hatton,

§ 643. **Having, with Intent.** — The offence of having in possession intoxicating liquors with intent to sell them contrary to law

15 B. Monr. 537; Commonwealth *v.* Hadcraft, 6 Bush, 91; Herine *v.* Commonwealth, 13 Bush, 295; Wilson *v.* Commonwealth, 14 Bush, 159.

Louisiana. — The State *v.* Karn, 16 La. An. 183.

Maine. — The State *v.* Cottle, 15 Maine, 473; The State *v.* Stinson, 17 Maine, 154; The State *v.* Churchill, 25 Maine, 306; The State *v.* Gurney, 33 Maine, 527; The State *v.* McNally, 34 Maine, 210; The State *v.* Hadlock, 43 Maine, 282; The State *v.* Staples, 45 Maine, 320; The State *v.* Kaler, 56 Maine, 88; The State *v.* Smith, 64 Maine, 423; The State *v.* Plunkett, 64 Maine, 534; The State *v.* Gorham, 65 Maine, 270; The State *v.* Regan, 67 Maine, 380; The State *v.* Grames, 68 Maine, 418.

Maryland. — Bode *v.* The State, 7 Gill, 326; Rawlings *v.* The State, 2 Md. 201; Keller *v.* The State, 11 Md. 525; Franklin *v.* The State, 12 Md. 236; Maguire *v.* The State, 47 Md. 485; The State *v.* Strauss, 49 Md. 288.

Massachusetts. — Commonwealth *v.* Eaton, 9 Pick. 165; Commonwealth *v.* Pray, 13 Pick. 359; Commonwealth *v.* Phillips, 16 Pick. 211; Commonwealth *v.* Dean, 21 Pick. 334; Commonwealth *v.* Odlin, 23 Pick. 275; Commonwealth *v.* Thurlow, 24 Pick. 374; Commonwealth *v.* Churchill, 2 Met. 118; Commonwealth *v.* Pearson, 3 Met. 449; Goodhue *v.* Commonwealth, 5 Met. 553; Commonwealth *v.* Kimball, 7 Met. 304, 308; Commonwealth *v.* Penniman, 8 Met. 519; Commonwealth *v.* Thayer, 8 Met. 523; Commonwealth *v.* Tower, 8 Met. 527; Commonwealth *v.* Leonard, 8 Met. 529; Commonwealth *v.* Leonard, 8 Met. 530; Commonwealth *v.* Bryden, 9 Met. 137; Commonwealth *v.* Stowell, 9 Met. 569; Commonwealth *v.* White, 10 Met. 14; Commonwealth *v.* Porter, 10 Met. 263; Commonwealth *v.* Briggs, 11 Met. 573; Commonwealth *v.* Brown, 12 Met. 522; Commonwealth *v.* Buek, 12 Met. 524; Commonwealth *v.* Wilcox, 1 Cush. 503; Commonwealth *v.* Roberts, 1 Cush. 505; Commonwealth *v.* Sloan, 4 Cush. 52; Commonwealth *v.* Herrick, 6 Cush. 465; Commonwealth *v.* Moulton, 10 Cush. 404; Commonwealth *v.* Baker, 10 Cush. 405; Commonwealth *v.* Hart, 11 Cush. 130; Commonwealth *v.* Wilson, 11 Cush. 412; Commonwealth *v.* Edwards, 12 Cush. 187; Commonwealth *v.* Kendall, 12 Cush. 414; Commonwealth *v.* Albro, 1 Gray, 1; Commonwealth *v.* Giles, 1 Gray, 466; Commonwealth *v.* Adams, 1 Gray, 481; Commonwealth *v.* Murphy, 2 Gray, 510; Commonwealth *v.* Lafontaine, 3 Gray, 479; Commonwealth *v.* McSherry, 3 Gray, 481, note; Commonwealth *v.* Edwards, 4 Gray, 1; Commonwealth *v.* Wood, 4 Gray, 11; Commonwealth *v.* Newell, 5 Gray, 76; Commonwealth *v.* Clapp, 5 Gray, 97; Commonwealth *v.* Quin, 5 Gray, 478; Commonwealth *v.* Hitchings, 5 Gray, 482; Commonwealth *v.* Cummings, 6 Gray, 487; Commonwealth *v.* Name Unknown, 6 Gray, 489; Commonwealth *v.* Jones, 7 Gray, 415; Commonwealth *v.* Keefe, 7 Gray, 332; Commonwealth *v.* Gilland, 9 Gray, 3; Commonwealth *v.* Woods, 9 Gray, 131; Commonwealth *v.* Ryan, 9 Gray, 137; Commonwealth *v.* Colton, 11 Gray, 1; Commonwealth *v.* Dillane, 11 Gray, 67; Commonwealth *v.* Waters, 11 Gray, 81; Commonwealth *v.* Hoye, 11 Gray, 462; Commonwealth *v.* McKenney, 14 Gray, 1; Commonwealth *v.* Snow, 14 Gray, 20; Commonwealth *v.* Kingman, 14 Gray, 85; Commonwealth *v.* Intoxicating Liquors, 4 Allen, 593; Commonwealth *v.* Hutchinson, 6 Allen, 595; Commonwealth *v.* Intoxicating Liquors, 6 Allen, 599; Commonwealth *v.* Blake, 12 Allen, 188; Commonwealth *v.* Intoxicating Liquors, 13 Allen, 52, 561; Commonwealth *v.* Intoxicating Liquors, 97 Mass. 334; Commonwealth *v.* Chisholm, 103 Mass. 213; Commonwealth *v.* Desmond, 103 Mass. 445; Commonwealth *v.* Intoxicating Liquors, 103 Mass. 448; Commonwealth *v.* Blanchard, 105 Mass. 173; Commonwealth *v.* Sheehan, 105 Mass. 174; Commonwealth *v.* Intoxicating Liquors, 105 Mass. 181; Commonwealth *v.* Intoxicating Liquors, 108 Mass. 19; Commonwealth *v.* Grady, 108 Mass. 412; Doherty *v.* Commonwealth, 109 Mass. 359; Commonwealth *v.* Intoxicating Liquors, 109 Mass. 371; Commonwealth *v.* Intoxicating Liquors, 110 Mass. 182; Commonwealth *v.* Intoxicating

is not known in all of our States, and it differs somewhat in those where it is known. And the proceedings against the offender

Liquors, 110 Mass. 416; Commonwealth v. Intoxicating Liquors, 110 Mass. 499; Commonwealth v. Harvey, 111 Mass. 420; Commonwealth v. Dunn, 111 Mass. 425, 426; Commonwealth v. Taylor, 113 Mass. 1; Commonwealth v. Hogan, 113 Mass. 7; Commonwealth v. Intoxicating Liquors, 113 Mass. 13, 208, 455; Commonwealth v. Locke, 114 Mass. 288; Commonwealth v. Doherty, 116 Mass. 13; Commonwealth v. Intoxicating Liquors, 116 Mass. 27, 342; Commonwealth v. Holmes, 119 Mass. 195; Commonwealth v. Fredericks, 119 Mass. 199; Commonwealth v. Curran, 119 Mass. 206; Commonwealth v. Lattinville, 120 Mass. 385; Commonwealth v. Burke, 121 Mass. 39; Commonwealth v. Davis, 121 Mass. 352; Commonwealth v. Hoar, 121 Mass. 375; Commonwealth v. Hanley, 121 Mass. 377; Commonwealth v. Intoxicating Liquors, 122 Mass. 8, 14; Commonwealth v. Hoyer, 125 Mass. 209; Commonwealth v. Byrnes, 126 Mass. 248; Commonwealth v. Hickey, 126 Mass. 250; Commonwealth v. Sprague, 128 Mass. 75; Commonwealth v. McKiernan, 128 Mass. 414; Commonwealth v. Donahoe, 130 Mass. 280; Commonwealth v. Costello, 133 Mass. 192; Commonwealth v. Anberton, 133 Mass. 404.

Minnesota. — The State v. Ludwig, 21 Minn. 202; The State v. Richter, 23 Minn. 81; The State v. Kobe, 26 Minn. 148, 149; The State v. Lavake, 26 Minn. 526, 527; The State v. Hyde, 27 Minn. 153; The State v. Langdon, 29 Minn. 393, 394.

Mississippi. — Kliffield v. The State, 4 How. Missis. 304; Murphy v. The State, 24 Missis. 590; Miazza v. The State, 36 Missis. 613; Riley v. The State, 43 Missis. 397.

Missouri. — Storrs v. The State, 3 Misso. 9; The State v. Anberry, 7 Misso. 304; The State v. Wishon, 15 Misso. 503; The State v. Owen, 15 Misso. 506; The State v. Williamson, 19 Misso. 384; The State v. Arbogast, 24 Misso. 363; The State v. Andrews, 26 Misso. 169, 171; The State v. Murphy, 47 Misso. 274; The State v. Lisles, 58 Misso. 359; The State v. Roehm, 61 Misso. 82; The State v. Jaeger, 63 Misso. 403, 405; The State v. Jaques, 68 Misso. 260; The State v. Baker, 71 Misso. 475; The State v. McGrath, 73 Misso. 181; The State v. Tissing, 74 Misso. 72.

Montana. — United States v. Sacramento, 2 Mon. Ter. 239, 240.

New Hampshire. — The State v. Adams, 6 N. H. 532; Price v. The State, 13 N. H. 536; The State v. Moore, 14 N. H. 451; The State v. Wiggin, 20 N. H. 449; The State v. Burns, 20 N. H. 550; The State v. Perkins, 6 Fost. N. H. 9; The State v. Abbot, 11 Fost. N. H. 434; The State v. Fuller, 33 N. H. 259.

New Jersey. — The State v. Webster, 5 Halst. 293.

New York. — People v. Adams, 17 Wend. 475; People v. Townsey, 5 Denio, 70; Van Zant v. People, 2 Parker C. C. 168, 170; People v. Wheelock, 3 Parker C. C. 9; French v. People, 3 Parker C. C. 114; People v. Gilkinson, 4 Parker C. C. 26; People v. Cramer, 5 Parker C. C. 171, 173; People v. Bennett, 5 Abb. Pr. 384, 386.

North Carolina. — The State v. Shaw, 2 Dev. 198; The State v. Muse, 4 Dev. & Bat. 319; The State v. Blythe, 1 Dev. & Bat. 199; The State v. Fancett, 4 Dev. & Bat. 107; The State v. Stamey, 71 N. C. 202; The State v. Joyner, 81 N. C. 534.

Ohio. — Hall v. The State, 20 Ohio, 7; Kern v. The State, 7 Ohio State, 411; Moore v. The State, 12 Ohio State, 387; Picket v. The State, 22 Ohio State, 405; The State v. Conner, 30 Ohio State, 405, 406.

Oregon. — Burchard v. The State, 2 Oregon, 78.

Pennsylvania. — Commonwealth v. Baird, 4 S. & R. 141; Van Swartow v. Commonwealth, 12 Harris, Pa. 131; Jillard v. Commonwealth, 2 Casey, Pa. 169; Genkinger v. Commonwealth, 8 Casey, Pa. 99; Commonwealth v. Jessup, 13 Smith, Pa. 34.

Rhode Island. — The State v. Fletcher, 1 R. I. 193; The State v. Snow, 3 R. I. 64; The State v. O'Donnell, 10 R. I. 472; The State v. Amery, 12 R. I. 64; The State v. Campbell, 12 R. I. 147; The State v. Carver, 12 R. I. 285.

Tennessee. — Bilbro v. The State, 7

differ, and to a considerable extent they are prescribed by the varying statutes. Therefore it is not best to enter minutely into them. Under a provision to punish any one who "shall own or keep . . . any intoxicating liquor with intent to sell the same in this State," the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully own and keep in his possession certain kegs, bottles, and barrels of intoxicating liquors, with the intent to sell the same in his saloon there, being [in a case where there has been a search warrant] the same liquors which were thereupon, before the finding of this information [*or* indictment], taken from the premises of the said A on a search warrant; against the peace, &c.[1]

§ 644. **Another.** — Under a statute to punish one who shall "expose or keep for sale spirituous or intoxicating liquors, except as authorized in this act," it is good to aver, —

That A, &c. on, &c. at, &c. did unlawfully expose and keep intoxicating liquors[2] for sale and with the intent to sell the same[3] [in this Common-

Humph. 534; The State *v.* Harris, 2 Sneed, Tenn. 224; The State *v.* Irvine, 3 Heisk. 155; The State *v.* Staley, 3 Lea, 565.

Texas. — The State *v.* Robinson, 19 Texas, 478; The State *v.* Heldt, 41 Texas, 220; The State *v.* Perry, 44 Texas, 100; Hart *v.* The State, 2 Texas Ap. 39, 40; Bohl *v.* The State, 3 Texas Ap. 683; Carr *v.* The State, 5 Texas Ap. 153; Albrecht *v.* The State, 8 Texas Ap. 216; Albrecht *v.* The State, 8 Texas Ap. 313; Archer *v.* The State, 9 Texas Ap. 78; Archer *v.* The State, 10 Texas Ap. 482; White *v.* The State, 11 Texas Ap. 476; Eppstein *v.* The State, 11 Texas Ap. 480, 481; Sedberry *v.* The State, 14 Texas Ap. 233.

Vermont. — The State *v.* Sommers, 3 Vt. 156; The State *v.* Munger, 15 Vt. 290; The State *v.* Whitney, 15 Vt. 298; The State *v.* Clark, 23 Vt. 293; The State *v.* Woodward, 25 Vt. 616; The State *v.* O'Keefe, 41 Vt. 691; The State *v.* Reynolds, 47 Vt. 297; The State *v.* Benjamin, 49 Vt. 101; The State *v.* Higgins, 53 Vt. 191.

Virginia. — Commonwealth *v.* Dove, 2 Va. Cas. 26; Commonwealth *v.* Hatcher, 6 Grat. 667; Helfrick *v.* Commonwealth, 29 Grat. 844; Glass *v.* Commonwealth, 33 Grat. 827; Massie *v.* Commonwealth, 30 Grat. 841.

West Virginia. — The State *v.* Cain, 8 W. Va. 720; The State *v.* Cain, 9 W. Va. 559, 561; The State *v.* Gilmore, 9 W. Va. 641, 642; The State *v.* Thomas, 13 W. Va. 848; The State *v.* Whitter, 18 W. Va. 306, 307.

Wisconsin. — Allen *v.* The State, 5 Wis. 329.

United States. — United States *v.* Winslow, 3 Saw. 337 (selling to Indians); United States *v.* Forty-three Gallons of Whiskey, 93 U. S. 188 (for forfeiture of liquors to Indians).

[1] Founded upon the precedent in The State *v.* Mohr, 53 Iowa, 261. And see The State *v.* Findley, 45 Iowa, 435; The State *v.* Thompson, 44 Iowa, 399; Santo *v.* The State, 2 Iowa, 165.

[2] As a question of principle, we may possibly doubt whether there should not be some particularization of the liquors exposed and kept. Crim. Proced. I. § 566–584. But the form in the text accords with numerous precedents deemed good. And in reason the case differs from that of a sale, where bulk is broken, and a part is separated from a remaining mass. Here there is simply one offence, it is founded on all the liquors which the defendant has, and their kinds and quantities are immaterial.

[3] **"For sale and with the intent to sell."** — This double expression (The State *v.* Mohr, 53 Iowa, 261, 262) covers in exact

wealth [1]], not then and there having any authority or license therefor;[2] against the peace, &c.[3]

§ 645. **Proceedings for Confiscation.** — The proceedings for seizing and confiscating liquors kept for unlawful sale are prescribed by statutes, which the practitioner will consult; they are not universal; they differ in the States; and the reader need only be referred to places in the reports where, in part or in full, they are given.[4]

words the statute, and everything which any one might claim to be its interpreted meaning beyond. It is a method of pleading not unfrequently well to resort to by way of caution. Still the words "for sale" have been adjudged, no doubt correctly, not to be essential where the others are employed, and from most of the precedents they are omitted.

[1] It seems to have been assumed by pleaders in some of the cases that the words in these brackets are necessary. But, not inquiring how it may be on a consideration of all the statutes, the mere clause in the text certainly does not require them. The utmost that can be said against the indictment without these words is, that it charges an intent to sell wherever purchasers can be found, whether in the State or out of it. If so, it avers an intent to sell as well in the State where the liquor is kept for sale as in other States; and, if we assume that it charges both, and that only one is indictable, the case is within the principle stated ante, § 556. The surplusage of alleged intent does no harm. And see Crim. Proced. I. § 383. Indeed, under another statute, the matter in these brackets was expressly adjudged to be unnecessary. Commonwealth *v.* Edwards, 12 Cush 187.

[2] Ante, § 642; Commonwealth *v.* Grady, 108 Mass. 412; Commonwealth *v.* Chisholm, 103 Mass. 213; Commonwealth *v.* Taylor, 113 Mass. 1.

[3] For precedents, see and compare Commonwealth *v.* Curran, 119 Mass. 206; Commonwealth *v.* Sprague, 128 Mass. 75; Commonwealth *v.* Byrnes, 126 Mass. 248; Commonwealth *v.* Hickey, 126 Mass. 250; Commonwealth *v.* Hoar, 121 Mass. 375; Commonwealth *v.* Hanley, 121 Mass. 377; Commonwealth *v.* Edwards, supra; Commonwealth *v.* Gilland, 9 Gray, 3; Commonwealth *v.* Chisholm, supra; Commonwealth *v.* Desmond, 103 Mass. 445; Commonwealth *v.* Sheehan, 105 Mass. 174; Commonwealth *v.* Grady, supra; Commonwealth *v.* Harvey, 111 Mass. 420; Commonwealth *v.* Taylor, supra. **Other States.** — For forms in other States, see Keller *v.* The State, 11 Md. 525; People *v.* Bennett, 5 Abb. Pr. 384, 386; The State *v.* Amery, 12 R. I. 64; The State *v.* Campbell, 12 R. I. 147; The State *v.* Plunkett, 64 Maine, 534; The State *v.* Gorham, 65 Maine, 270. In The State *v.* Reynolds, 47 Vt. 297, the following, in substance, was adjudged to be good: —

That A, &c. on, &c. at, &c. did own, keep, and possess a large quantity, to wit, two quarts, of intoxicating liquors, with the unlawful intent then and there unlawfully to sell, furnish, and give away the same, not having then and there any authority of law or license therefor; against the peace, &c.

[4] *Iowa.* — Santo *v.* The State, 2 Iowa, 165; The State *v.* Thompson, 44 Iowa, 399.

Maine. — The State *v.* Gurney, 33 Maine, 527; The State *v.* McNally, 34 Maine, 210; The State *v.* Kaler, 56 Maine, 88; The State *v.* Regan, 67 Maine, 380; The State *v.* Grames, 68 Maine, 418.

Massachusetts. — Commonwealth *v.* Albro, 1 Gray, 1; Commonwealth *v.* Intoxicating Liquors, 4 Allen, 593; Commonwealth *v.* Intoxicating Liquors, 6 Allen, 599; Commonwealth *v.* Intoxicating Liquors, 13 Allen, 52, 561; Commonwealth *v.* Intoxicating Liquors, 97 Mass. 334; Commonwealth *v.* Intoxicating Liquors, 103 Mass. 448; Commonwealth *v.* Intoxicating Liquors, 105 Mass. 181; Commonwealth *v.* Intoxicating Liquors, 108 Mass. 19; Commonwealth *v.* Intoxicating Liquors, 109 Mass. 371; Commonwealth *v.* Intoxi-

§ 646. **Transporting.** — There are statutes, in various terms, making the transporting of liquors sold or intended for sale, by a common carrier or other person, knowing or reasonably suspecting the facts, punishable. The indictment must cover the particular terms. Under one of them it is adjudged good to say, —

That A, &c. on, &c. at, &c. did unlawfully receive certain intoxicating liquors, to wit, three gallons, &c. [describing the liquors], for the purpose then and there of conveying said liquors to some person whose name is to the complainant unknown, and was then and there conveying said liquors in [a town mentioned] on M street in said town, to said unknown person, the same being intended for illegal sale contrary to, &c. [specifying the statute], the said liquors having been sold in this State contrary to the provisions of said statute, he the said A then and there having reasonable cause to believe that said liquors had been so sold and are so intended for sale, as aforesaid; against the peace, &c.[1]

§ 647. **Keeping Place.** — We have statutes in varying terms to punish the keeping of a place wherein to sell intoxicating liquor contrary to the established regulations. While the offence they create is similar to that of liquor nuisance, to be considered under the title "Nuisance," it is distinguishable therefrom. One of these statutes provides, that, "if any person or persons, except taverners, by an agent or otherwise, shall keep any house, store, shop, or other place, for the purpose of selling any wine or spirituous liquor, to be drank thereat," the offender shall, &c. And the allegations may be, —

That A, &c. on, &c. [as at ante, § 80, or with the continuando as at ante, § 83, as the pleader chooses [2]], at, &c. not being a taverner, did [with force

cating Liquors, 110 Mass. 182, 416, 499; Commonwealth *v.* Intoxicating Liquors, 113 Mass. 13, 208; Commonwealth *v.* Intoxicating Liquors, 116 Mass. 27, 342; Commonwealth *v.* Intoxicating Liquors, 122 Mass. 8, 14.

Rhode Island. — The State *v.* Snow, 3 R. I. 64.

United States. — Proceedings to obtain forfeiture of liquors being introduced into Indian territory, United States *v.* Forty-three Gallons of Whiskey, 93 U. S. 188.

[1] Commonwealth *v.* Locke, 114 Mass. 288. Doubtless much of this is surplusage, or expressed in more words than necessary. But, as the statutes greatly vary, and as the pleader will cover the particular terms before him, no good would come from an endeavor to reduce it to its smallest proportions. In its present shape, it will be suggestive, and it could if reduced be no more. For other precedents, see Commonwealth *v.* Waters, 11 Gray, 81; Commonwealth *v.* Name Unknown, 6 Gray, 489; Commonwealth *v.* Hutchinson, 6 Allen, 595; Commonwealth *v.* Doherty, 116 Mass. 13; Commonwealth *v.* Blanchard, 105 Mass. 173; The State *v.* Benjamin, 49 Vt. 101; The State *v.* Higgins, 53 Vt. 191.

[2] Ante, § 81–84.

and arms [1]] keep a certain store [*or* shop] [on M street there [2]] for the purpose of selling wine and spirituous liquors to be drank thereat; against the peace [of evil example [3]], &c.[4]

§ 648. **Selling — (How the Indictment).** — The expositions under this head in "Statutory Crimes" are so full as to leave little occasion for forms.[5] The reader will there see that in some particulars the courts differ as to what the allegations must be. But the most exacting require no more than is fairly essential to apprise the accused of what he must answer to at the trial, — an easy task for the pleader, involving nothing difficult, and the writing of only a few words.[6] Practically, therefore, the considerate prosecuting officer will abstain from asking the tribunal to accept meagre averments, whose sufficiency is doubtful in principle, and especially those which in some of the States have been legislatively authorized in defiance of both natural and constitutional justice.[7] The language of the statute proceeded upon must be covered by allegations drawn with reference to the special nature of the offence. In general, and subject to exceptions, it is either required by the courts or practically best to state the name of the liquor sold or say that it is unknown to the jurors,[8] — give the quantity, and add that it is less than a specified larger quantity the selling whereof the statute permits,[9] — the name of the purchaser, or say that it is to the jurors unknown;[10] and aver, when an element in the offence, that the sale was in the night, or on a Sunday, or election day, or that the purchaser was a minor, or drunk, or a drunkard, and so of whatever else the statute has specified as founda-

[1] In the form before me, but not necessary. Ante, § 43.

[2] In the form before me. But I know of no legal rule or common practice rendering the allegation of the street essential.

[3] Not necessary. Ante, § 48; Crim. Proced. I. § 647.

[4] Barth *v.* The State, 18 Conn. 432. For various precedents under similar provisions, see Rawson *v.* The State, 19 Conn. 292; Kern *v.* The State, 7 Ohio State, 411; The State *v.* Brandon, 28 Ark. 410; The State *v.* Thompson, 2 Kan. 432; The State *v.* Auberry, 7 Misso. 304. The following (Ramsey *v.* The State, 6 Eng. 35) is good on a statute which it covers: —

That A, &c. on, &c. at, &c. did keep a grocery for the retail of ardent spirits by quantities less than one quart, without first having, &c. [a license, ante, § 642]; against the peace, &c.

[5] Stat. Crimes, § 1033 *a*–1044.

[6] Price. — I should except from this observation those decisions, not numerous, which require an allegation of the price received for the liquor. They appear to be neither well founded in legal doctrine, nor called for by any principle of natural justice. Ib. § 1040.

[7] Stat. Crimes, § 1036.

[8] Ib. § 1038.

[9] Ib. § 1039.

[10] Ib. § 1037.

tion for the particular punishment sought to be inflicted. To illustrate: —

§ 649. **Single Unlicensed Sale.** — On a common form of the statute, providing a penalty for the unlicensed sale of intoxicating liquor in less quantities than one quart, a good and everywhere sufficient method of allegation, except where price is required,[1] is to say, —

That A, &c. on, &c. at, &c. not having authority or license to sell intoxicating liquor in quantities less than one quart at one sale [*or*, insert the negative of the license in a final clause and as at ante, § 644, in either case making it broad enough to exclude every sort of authority known to the law], did then and there sell to one X[2] [*or*, to some person to the jurors unknown], a less quantity of whiskey[3] [*or*, of a certain intoxicating liquor the name whereof is to the jurors unknown] than one quart, to wit, one gill[4] thereof [*and*, if there is doubt as to the proofs, add here other averments of sales, to the extent practicable without making the indictment double, and put any desirable matter which would produce this effect into subsequent counts]; against the peace, &c.[5]

[1] Ante, § 648, note.

[2] If the sale was to two or more persons jointly, their several names should be given, in the manner pointed out ante, § 79, and it will be a fatal variance to allege a sale to one and prove a sale to him and others who were joint purchasers. Stat. Crimes, § 1047.

[3] As to this form of the averment see Stat. Crimes, § 1038.

[4] There will be no variance if the proof discloses any quantity, certain or uncertain, measured or not, which the jury is satisfied was less than a quart. Crim. Proced. I. § 488 *b*; Stat. Crimes, § 1047.

[5] For forms and precedents, see Stat. Crimes, § 1034, and a large part of the cases cited ante, § 642. Some of the forms sustained by adjudication in particular localities, and under the statutes there existing, are: —

That A, &c. on, &c. at, &c. "unlawfully did sell spirituous and intoxicating liquor by retail, to wit, one bottle of brandy to one X, at and for the price of, &c. without having a license so to do, as by law required, the said spirituous and intoxicating liquor being so sold for other than for strictly medical purposes;" against the peace, &c. Reg. *v.* Denham, 35 U. C. Q. B. 503.

Under the words "sell, directly or indirectly, any wines or spirituous liquors, in any town in this State, without liberty granted by the town," —

That A, &c. on, &c. "did, at said M, sell spirituous liquors to one X, without liberty granted by the town of M;" against the peace, &c. Whiting *v.* The State, 14 Conn. 487. And see The State *v.* Martin, 34 Ark. 340. Under the Texas local-option law, Sedberry *v.* The State, 14 Texas Ap. 233.

Under the words, among others, "Each and every vendor of any measure less than one gallon, of distilled spirituous or intoxicating liquor shall," &c. [subscribe an oath], —

That A, &c. on, &c. at, &c. did "sell and vend less than one gallon of distilled spirituous liquors without first taking and subscribing the oath prescribed by law to be taken by all applicants for license to retail," &c. [continuing the negative in the words of the statute]. Woody *v.* The State, 32 Ga. 595.

Under a statute otherwise expressed, —

That A, &c. on, &c. at, &c. did "sell to X one gill of an intoxicating liquor at and for the price of ten cents," "not then and there being licensed according to law to vend intoxicating liquors in a less quantity than a quart at a time;" against the peace, &c. Coverdale *v.* The State, 60 Ind. 307. For like forms, see Mitchell *v.* The State, 63

§ 650. **To be drank on Premises.**[1] — Under a statute to punish one who "shall sell any wine or spirituous liquor, &c. to be used in or about his house or other buildings, without being duly licensed as an innholder or common victualler," the allegations may be, —

That A, &c. on, &c. at, &c. did sell to one X one glass [*or* gill] of [a spirituous liquor called [2]] brandy, to be used in and about his the said A's house there, without being first duly licensed as an innholder or common victualler; against the peace, &c.[3]

§ 651. **Near Institution of Learning.** — The terms of the statutes, which must be covered, are not quite uniform. Allegations adjudged adequate in Texas are, —

Ind. 276; The State *v.* Buckner, 52 Ind. 278; Stevenson *v.* The State, 65 Ind. 409.

Under the words, "If any person, not licensed, shall sell any spirituous liquors or wine, mixed or otherwise, in any quantity, he shall," &c. —

That A, &c. on, &c. at, &c. "not being then and there licensed to sell wine and spirituous liquors, did then and there unlawfully sell two quarts of spirituous liquor, at one and the same time, to one X;" against the peace, &c. The State *v.* Fuller, 33 N. H. 259. Under another statute in like terms, Miazza *v.* The State, 36 Missis. 613.

Under different words, —

That A, &c. on, &c. at, &c. "being then and there licensed to sell wine and spirituous liquors for medicinal, mechanical, and chemical purposes, and for no other use and purpose, did then and there unlawfully sell one gallon of spirituous liquor to one X, it not being so sold for medicinal, mechanical, or chemical purposes, but for another and different use and purpose;" against the peace, &c. The State *v.* Perkins, 6 Fost. N. H. 9. For a like form upon a similar statute, see Riley *v.* The State, 43 Missis. 397.

Under the statutory words, "No person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of," &c. (R. S. of Mass. c. 47, § 3), —

That A, &c. on, &c. at, &c. "did sell to one X spirituous liquor in less quantity than twenty-eight gallons, she the said A not being duly licensed therefor;" against the peace, &c. Commonwealth *v.* Leonard, 8 Met. 530. For a longer form under this statute, see Goodbue *v.* Commonwealth, 5 Met. 553. Another, Commonwealth *v.* Kimball, 7 Met. 304, 308. Compare with Commonwealth *v.* Burke, 121 Mass. 39.

[1] Stat. Crimes, § 986, 1013, 1034 *b*, 1060–1063.

[2] In the form before me, but evidently not necessary, because brandy is judicially known to be a spirituous liquor. Stat. Crimes, § 1006 *a*–1009, 1038; ante, § 649.

[3] Commonwealth *v.* Brown, 12 Met. 522; Commonwealth *v.* Baker, 10 Cush. 405. As the statutes vary, and the terms of the particular one must be covered, there can be no form good under all. And see for further precedents, Commonwealth *v.* Hatcher, 6 Grat. 667; Bilbro *v.* The State, 7 Humph. 534; Hintermiester *v.* The State, 1 Iowa, 101; Storrs *v.* The State, 3 Misso. 9; The State *v.* Williamson, 19 Misso. 384; The State *v.* Andrews, 26 Misso. 169, 171; Moore *v.* The State, 12 Ohio State, 387; Vanderwood *v.* The State, 50 Ind. 295; The State *v.* Woulfe, 58 Ind. 17. In The State *v.* Perry, 44 Texas, 100, the form, held good, was, —

That A, &c. on, &c. at, &c. "did unlawfully sell [and was concerned in selling, *unnecessary*, ante, § 139 and note] a quantity of intoxicating liquors, to wit, one quart of whiskey to one X, without first having obtained a license therefor, and did then and there permit the same to be drunk," &c.; against the peace, &c.

That A, &c. on, &c. at, &c. did unlawfully, and contrary to the special statute in such case made and provided, approved, &c. sell intoxicating and spirituous liquors to divers persons to the jurors unknown, within less than two miles of Douglassville College, in said county; against the peace, &c.[1]

§ 652. **To Minor — To Drunkard.**[2] — The allegations may be the same as at ante, § 649; adding, after X, "who was then and there[3] a minor under the age of twenty-one years," or "who was then and there a person in the habit of becoming intoxicated," with any other or different variations which may be necessary to cover the terms of the particular statute.[4]

§ 653. **On Sunday.**[5] — For selling liquor, or keeping open a

[1] The State *v.* Heldt, 41 Texas, 220. For other precedents, see Blackwell *v.* The State, 36 Ark. 178; Wilson *v.* The State, 35 Ark. 414; The State *v.* Stanley, 3 Lea, 565; Weist *v.* People, 39 Ill. 507. **Near Certain Manufacturing Establishments,** — Hall *v.* The State, 20 Ohio, 7.

[2] Stat. Crimes, § 237, 986, 988 *a*, 1021, 1022, 1034 *a*, 1048 *a*, 1049.

[3] Stat. Crimes, § 1034 *a*.

[4] Under the words "sell, barter, or give away, directly or indirectly, any spirituous, vinous, or malt liquors, to any person under the age of twenty-one years," it is good in Indiana to aver, —

That A, &c. on, &c. at, &c. "did unlawfully sell to one X, who was then and there a person under twenty-one years of age, one quart of intoxicating liquor, at and for the price of one dollar;" against the peace, &c. Payne *v.* The State, 74 Ind. 203; Johnson *v.* The State, 74 Ind. 197; The State *v.* Mulhisen, 69 Ind. 145.

Upon a statute making it unlawful for any person or persons, by agent, or otherwise, to sell intoxicating liquors to minors, unless upon the written order of their parents, guardians, or family physician, it has been in West Virginia adjudged good to charge, —

That A, &c. on, &c. at, &c. "unlawfully did sell intoxicating liquors to one X, a minor under the age of twenty-one years, he, the said A, knowing [the word "knowing" is believed not to be necessary under this form of the statute, Crim. Law, I. § 302, 303 *a*, note, par. 20; Crim. Proced. I. § 522, 523; Stat. Crimes, § 1022, 1034 *a*] the said X to be a minor, and not having the written order of his parents, guardians, or family physician therefor;" against the peace, &c. The State *v.* Cain, 9 W. Va. 559, 561; The State *v.* Gilmore, 9 W. Va. 641, 642.

For other precedents for selling to **Minor,** — see Bryan *v.* The State, 45 Ala. 86; Weed *v.* The State, 55 Ala. 13; Watson *v.* The State, 55 Ala. 158; Atkins *v.* The State, 60 Ala. 45; The State *v.* Emerick, 35 Ark. 324; Redmond *v.* The State, 36 Ark. 58; Hale *v.* The State, 36 Ark. 150; Cloud *v.* The State, 36 Ark. 151; Newman *v.* The State, 63 Ga. 533; Reich *v.* The State, 63 Ga. 616; McCutcheon *v.* People, 69 Ill. 601, 602; Ihrig *v.* The State, 40 Ind. 422; Robinius *v.* The State, 63 Ind. 235; Arbintrode *v.* The State, 67 Ind. 267; Grupe *v.* The State, 67 Ind. 327; Commonwealth *v.* Hadcraft, 6 Bush, 91; Commonwealth *v.* Lattinville, 120 Mass. 385; The State *v.* Richter, 23 Minn. 81; Commonwealth *v.* Jessup, 13 Smith, Pa. 34.

To Drunkard. — Farrell *v.* The State, 45 Ind. 371, 372; The State *v.* Zeitler, 63 Ind. 441; Berry *v.* The State, 67 Ind. 222; Mapes *v.* People, 69 Ill. 523, 525; Murphy *v.* People, 90 Ill. 59; Wiedemann *v.* People, 92 Ill. 314; Barnes *v.* The State, 19 Conn. 398; Tatum *v.* The State, 63 Ala. 147.

To Indian. — The State *v.* Jackson, 4 Blackf. 49; United States *v.* Winslow, 3 Saw. 337.

To Negro. — Lodano *v.* The State, 25 Ala. 64.

[5] Stat. Crimes, § 143, 213, 1070 *a*; Crim. Law, II. § 955, 961, 962, 966, 967.

place for its sale, on Sunday, the indictment is the same as for the like offence on any other day; except that, in due form, and covering the statutory terms, the allegation of time is expanded; as, —

On, &c. being Sunday, [*or*, the Lord's day, &c. employing the statutory word, ante, § 85; *and*, in cases requiring it [1]] between the hours of, &c. and, &c. of said day [ante, § 86; post, § 663].[2]

§ 654. **On Election Day — Holiday — Night.** — The allegation of time is simply expanded by the proper setting out of the day or time of day, in like manner as for selling on Sunday. In other respects the indictment follows the ordinary forms.[3]

§ 655. **Common Seller.**[4] — The indictment for being a common seller of intoxicating liquor is drawn on a different principle from that for a single sale. It may allege —

That A, &c. on, &c. [as at ante, § 80, or with the continuando as at ante, § 83, 84, at the election of the pleader [5]], at, &c. was a common seller of intoxicating liquors, &c. [shaping this averment to the statutory expression, and negativing a license]; against the peace, &c.[6]

[1] Crim. Proced. I. § 399.

[2] For precedents of the indictment for various forms of the offence, see 3 Chit. Crim. Law, 672; Reg. *v.* French, 34 U. C. Q. B. 403; The State *v.* Parnell, 16 Ark. 506; Bode *v.* The State, 7 Gill, 326; Maguire *v.* The State, 47 Md. 485; Commonwealth *v.* Hoyer, 125 Mass. 209; Commonwealth *v.* McKiernan, 128 Mass. 414; The State *v.* Ludwig, 21 Minn. 202; The State *v.* Murphy, 47 Misso. 274; The State *v.* Lisles, 58 Misso. 359; The State *v.* Roehm, 61 Misso. 82; Van Zant *v.* People, 2 Parker C. C. 168, 170; Burchand *v.* The State, 2 Oregon, 78; Van Swantow *v.* Commonwealth, 12 Harris, Pa. 131; Bohl *v.* The State, 3 Texas Ap. 683; Albrecht *v.* The State, 8 Texas Ap. 313; Archer *v.* The State, 10 Texas Ap. 482.

[3] For precedents, see —

Selling on Election Day. — The State *v.* Stamey, 71 N. C. 202; The State *v.* Irvine, 3 Heisk. 155.

Disobeying Order — of police commissioner to close drinking places on election day, The State *v.* Strauss, 49 Md. 288.

Holiday. — For selling on legal holiday, Ruge *v.* The State, 62 Ind. 388.

Night, — selling at, The State *v.* Christman, 67 Ind. 328.

[4] Stat. Crimes, § 1018, 1027, 1035, 1037, 1046; Crim. Law, I. § 782, 1065; Crim. Proced. I. § 402, 645.

[5] See, as to a Massachusetts peculiarity, Crim. Proced. I. § 402 and note.

[6] For precedents, see Stat. Crimes, § 1035; Commonwealth *v.* Kendall, 12 Cush. 414; Commonwealth *v.* Pearson, 3 Met. 449; Commonwealth *v.* Pray, 13 Pick. 359; Commonwealth *v.* Odlin, 23 Pick. 275; Commonwealth *v.* Tower, 8 Met. 527; Commonwealth *v.* Briggs, 11 Met. 573; Commonwealth *v.* Hart, 11 Cush. 130; Commonwealth *v.* Wilson, 11 Cush. 412; Commonwealth *v.* Giles, 1 Gray, 466; Commonwealth *v.* Murphy, 2 Gray, 510; Commonwealth *v.* Edwards, 4 Gray, 1; Commonwealth *v.* Wood, 4 Gray, 11; Commonwealth *v.* Clapp, 5 Gray, 97; Commonwealth *v.* Jones, 7 Gray, 415; Commonwealth *v.* Woods, 9 Gray, 131; Commonwealth *v.* Colton, 11 Gray, 1; Commonwealth *v.* Hoye, 11 Gray, 462; Commonwealth *v.* McKenney, 14 Gray, 1; Commonwealth *v.* Snow, 14 Gray, 20; Commonwealth *v.* Kingman, 14 Gray, 85; The State *v.* Cottle, 15 Maine, 473; The State *v.* Stinson, 17 Maine, 154; The State *v.* Churchill, 25 Maine, 306.

§ 656. **Business of Selling — (Revenue Laws).** — Similar, as to the form of the indictment, is the carrying on of the business of selling, in violation of a revenue law. In Texas it was adjudged good to aver, substantially in the language of the statute, —

That A, &c. on, &c, at, &c. did pursue the occupation of selling spirituous liquors in quantities less than one quart, without first obtaining a license therefor, and he has not since paid the tax on such occupation; against the peace, &c.[1]

§ 657. **Traveller for Orders.** — A statute provided, that "no person shall travel from town to town or from place to place in any city, town, or plantation in this State, on foot, or by any kind of land or water public or private conveyance whatever, carrying for sale or offering for sale, or offering to obtain or obtaining orders for the sale or delivery of any spirituous, intoxicating, or fermented liquors, in any quantity, under a penalty of not less than twenty nor more than a hundred dollars for each offer to take an order, and for each order taken, and for each sale so made." And it was adjudged good to aver, —

That A, &c. on, &c. at a plantation called M, &c. did travel from place to place in said M, and did then and there represent himself to one X to be the agent of Y [of N[2]], for the purpose of procuring orders for the sale of intoxicating liquors, and did then and there obtain of the said X an order on said Y for the sale of a quantity of intoxicating liquors, to wit, four and three-fourths gallons of Medford rum, which said liquors were afterwards, to wit, on, &c. sent to said X [and by him received at M aforesaid[3]] on said order so obtained; against the peace, &c.[4]

§ 658. **Not Registering — (Bell-punch Law).** — The terms of the particular statute must be adhered to; in Texas, a conviction was sustained on the allegations, —

That A, &c. on, &c. at, &c. being a duly and legally licensed dealer in spirituous, vinous, and malt liquors in quantities less than a quart, then and there had permanently attached to his counter the register provided by law, marked "Malt," which said register had been obtained by him from

[1] Carr *v.* The State, 5 Texas Ap. 153. For precedents under the Alabama statute, see Harris *v.* The State, 50 Ala. 127; Lemons *v.* The State, 50 Ala. 130; Hafter *v.* The State, 51 Ala. 37; Lawson *v.* The State, 55 Ala. 118.

[2] I presume this allegation of the residence of the principal is needless. Ante, § 78, 79.

[3] The matter in these brackets is not in the form before me, nor does this or the other part of the averment that the rum was sent to the purchaser seem essential. But is not this matter in brackets necessary if the rest is? I should reject all, especially as thereby an embarrassing question of duplicity would be avoided.

[4] The State *v.* Smith, 64 Maine, 423.

the tax-collector of M county, and was then and there provided with a crank and bell as the law directs; whereupon the said A did then and there sell a drink of beer, being a glass thereof, and being malt liquor, to X, and unlawfully and wilfully, on the sale of the same, did fail to turn the crank of said register marked "Malt," and then and there unlawfully and wilfully did fail to register said drink of beer so sold as aforesaid to said X; against the peace, &c.[1]

§ 659. **Screen.** — Upon the words, "No licensed person shall place or maintain, or authorize or permit to be placed or maintained, upon any premises used by him for the sale of spirituous or intoxicating liquors under the provisions of his license, any screen, blind, shutter, curtain, partition, or painted, ground, or stained glass window, or any other obstruction, which shall interfere with a view of the business conducted upon the premises," the averments may be, —

That A, &c. on, &c. at, &c. being duly licensed to sell spirituous and intoxicating liquors in a certain room in a certain building there, and using said room for said purpose under his said license, did then and there unlawfully place and maintain [and authorize to be placed and maintained [2]], upon the said premises so used by him for said purpose under said license [say what, as], certain screens, blinds, shutters, partitions, and other obstructions, which interfered with a view of the business conducted upon said premises; against the peace, &c.[3]

§ 660. **Practical Suggestions.** — The legislation considered in this chapter is so rapidly changing that the pleader should be cautious about relying implicitly upon forms once good, whether found in reported cases or in books of forms. Let him consider carefully the present condition of the statutory law in his State, then lay before him the statutes and printed forms, and he will encounter no difficulties. For the defence, when the law is duly mastered, there will remain nothing which will not be obvious to the competent practitioner.

[1] Albrecht *v.* The State, 8 Texas Ap. 216. For like precedents under the Virginia statute, see Helfrick *v.* Commonwealth, 29 Grat. 844; Glass *v.* Commonwealth, 33 Grat. 827.

[2] Needless, unless perhaps under special facts. Ante, § 139 and note.

[3] For precedents, see Commonwealth *v.* Costello, 133 Mass. 192; Commonwealth *v.* Auberton, 133 Mass. 404.

For LIQUOR NUISANCE, see NUISANCE.
LIVING IN ADULTERY OR FORNICATION, see ADULTERY, &c.

CHAPTER LII.

LORD'S DAY.[1]

§ 661. **How the Indictment.** — Whatever be the common law of Sabbath-breaking, seldom will there be occasion to draw an indictment upon it; for, in the ordinary case, the proceeding on the statute will be plainer and more effective. Still, —

§ 662. **Common-law Nuisance.** — There may be circumstances in which the indictment for the common-law nuisance of Sabbath-breaking should be chosen. The practical difficulty is that the law of this offence is not with exactness defined.[2] But it is believed that the following will suffice in allegation: —

That A, &c. on, &c. being the day of the week set apart by law and custom for the cessation of ordinary labor and merchandising, and for repose, and for religious worship, called Sunday, or the Sabbath, or the Lord's day, and thence continually on every Sunday down to and including the last Sunday before the finding of this indictment,[3] at &c. was a common Sabbath-breaker and profaner of the Sabbath, and did then and there, and on all of said days there [ante, § 84], to the disturbance of the public repose and public order, and in annoyance of all well disposed people, open and keep open, beside and within view from a certain highway there, whereon were people continually and lawfully passing, and within view from many dwelling-houses wherein people were abiding, a certain shop and store, and publicly carry on the business of merchandising and buying and selling goods and chattels in and around the same, and continually bring and convey away merchandise to and from the same; to the common nuisance of all the people, and against the peace, &c.[4]

[1] For the direct expositions of the offence of Sabbath-breaking, or violating the Lord's day, see Crim. Law, II. § 950–970; Crim. Proced. II. § 812–818. Incidental, Crim. Law, I. § 499; II. § 1280; Crim. Proced. I. § 207, 399, 636, 641, 1001; Stat. Crimes, § 143, 198, 213, 237, 245, 852, 1070 *a*.

[2] Crim. Law, II. § 965, 967; Crim. Proced. II. § 812.

[3] I do not doubt that this offence may be committed on a single Sunday, and so the continuando is not strictly necessary. Ante, § 81. Still, in various circumstances, the pleader will doubtless choose to employ it.

[4] The following precedent is from 2 Chit. Crim. Law, 20; —

That A, &c. on, &c. and continually afterwards until the day of the taking of this

§ 663. **Formula for Indictment on Statute.** — The statutes are so diverse that no formula for the indictment upon them can be more than a partial outline and be accurate. Therefore only the following will be attempted: —

That A, &c. [ante, § 74–77] on, &c. being Sunday [*or*, the Lord's day, &c. employing the statutory word, *and*, where the statute limits the offence to a part of the day, add the allegation here, as see ante, § 85, 86, 653 [1]],

inquisition, at, &c. was and yet is a common Sabbath-breaker and profaner of the Lord's day, commonly called Sunday; and that the said A, on the said, &c. being the Lord's day, and on divers other days and times being the Lord's days during the time aforesaid, at, &c. in a certain place there called Claremarket, did keep a common public and open shop, and in the same shop did then and on the said other days and times being the Lord's days, there openly and publicly sell, and expose to sale, flesh meat, to divers persons to the jurors aforesaid as yet unknown; to the evil example of all others, to the common nuisance of all the liege subjects of our said Lord the King, and against the peace, &c.

Chitty explains: "See the precedent in Cro. C. C. 7th ed. 529, omitted in the 8th. As to the offence, according to Rex *v.* Brotherton, 1 Stra. 702, 2 Sess. Cas. 224; Drury *v.* Defontaine, 1 Taunt. 131, 134, it is not an offence at common law to sell goods on a Sunday, but publicly keeping an open shop seems to be indictable. See 4 Bl. Com. 63; 1 East P. C. 5. It is said in 1 Hawk. P. C. 7th ed. c. 6, § 6, that the selling meat on Sunday is no offence at the common law; yet that, if the offender keep open shop, the usual method is to indict at the sessions for the nuisance." This compiler, in another place (3 Chit. Crim. Law, 672), has the following, also upon the common law: —

That A, &c. being a common Sabbath-breaker and profaner of the Lord's day, on, &c. and on divers other days respectively, being the Lord's day, and between that day and the taking of this inquisition, during the time of divine service on each of the said respective days, to wit, at the hour of twelve on each of those days, at, &c. aforesaid, in the dwelling-house of him the said A there situate, being a common tippling-house, did openly sell and utter, and caused to be sold and uttered, ale and beer, and other liquors, to divers idle and ill-disposed persons, whose names to the jurors aforesaid are as yet unknown; and that the said A, on the said, &c. and on divers other days during the time of divine service on each respective day, at, &c. in his said dwelling-house, did unlawfully and wilfully permit and suffer divers idle, &c. to remain and continue drinking and tippling; to the common nuisance of his Majesty's liege subjects [an allegation which, Chitty intimates, is not necessary]; to the evil example, &c. in contempt, &c. and against the peace," &c.

Returning to the form proposed in the text, perhaps some pleaders will choose to add an averment of sales to persons named or unknown. Still I can discover no principle requiring this. And see ante, § 655, 656, and particularly the places there referred to; showing that such minuteness, in this class of offences, is not necessary. It will be seen that I have taken more pains than did the draughtsmen of the precedents from Chitty to set out the particulars which make the defendant's acts a public nuisance, not meaning to express any opinion upon the sufficiency of those precedents. Since a private sale on Sunday is not a common-law offence, the indictment must allege more; and the authorities are not distinct as to how much more.

[1] A statute, after creating various offences against the Lord's day, concluded, in a separate section: "The Lord's day shall include the time from midnight to midnight." Mass. Gen. Stats. c. 84, § 12. And a form of the allegation before me is, that on, &c. "that day being the Lord's day, and between the midnight preceding and the midnight succeeding the said day." Commonwealth *v.* Wright, 12 Allen, 187. Pretty plainly, in principle, the simple averment that the time was the Lord's day, without the words "between the midnight," &c. would have sufficed. And, in Commonwealth *v.* Lynch, 8 Gray, 384; Com-

at, &c. did, &c. [say what]; against the peace, &c. [ante, § 65–69].[1]

§ 664. **Keeping Open Shop.** — Under a statute to punish one who, "on the Lord's day, keeps open his shop, warehouse, or workhouse, or does any manner of labor, business, or work, except works of necessity and charity,"[2] the allegations for keeping open shop must extend beyond these mere statutory words, and state some unlawful purpose therein; for such purpose the statute, by interpretation,[3] requires as an element in the offence.[4] The averments may be, —

That A, &c. on, &c. being the Lord's day,[5] at, &c. did keep open his shop there for the purpose of doing business therein [*or* exposing for sale

monwealth *v.* Sampson, 97 Mass. 407, and various other cases wherein the proceeding was sustained, no more was alleged. An earlier statute in this State declared that the Lord's day should "extend from the midnight preceding to the sunsetting of that day." And it was held that these words need not be covered by averment. "The statute," said Parsons, C. J., "has defined the time which is intended to be considered as the Lord's day. It is, therefore, regular to allege the fact on the Lord's day generally." Commonwealth *v.* Messenger, 4 Mass. 462, 465. For a doctrine local to Georgia, see Werner *v.* The State, 51 Ga. 426; Crim. Proced. I. § 399.

[1] For precedents, see Reg. *v.* Cleworth, 4 B. & S. 926; Reg. *v.* Howarth, 33 U. C. Q. B. 537.

Arkansas. — The State *v.* Anderson, 30 Ark. 131; The State *v.* Jeffrey, 33 Ark. 136; Bridges *v.* The State, 37 Ark. 224.

California. — People *v.* Maguire, 26 Cal. 635, 639.

Georgia. — Werner *v.* The State, 51 Ga. 426.

Idaho. — People *v.* Griffin, 1 Idaho Ter. N. S. 476.

Indiana. — Foltz *v.* The State, 33 Ind. 215; Eitel *v.* The State, 33 Ind. 201; McCarthy *v.* The State, 56 Ind. 203; Wilkinson *v.* The State, 59 Ind. 416; Edgerton *v.* The State, 67 Ind. 588; Carver *v.* The State, 69 Ind. 61; Mueller *v.* The State, 76 Ind. 310; Yonoski *v.* The State, 79 Ind. 393.

Massachusetts. — Commonwealth *v.* Messenger, 4 Mass. 462; Commonwealth *v.* Knox, 6 Mass. 76; Commonwealth *v.* Maxwell, 2 Pick. 139; Commonwealth *v.* Collins, 2 Cush. 556; Commonwealth *v.* Lynch, 8 Gray, 384; Commonwealth *v.* Colton, 8 Gray, 488; Commonwealth *v.* Wright, 12 Allen, 187; Commonwealth *v.* Sampson, 97 Mass. 407; Commonwealth *v.* Crowther, 117 Mass. 116.

Michigan. — Lynch *v.* People, 16 Mich. 472.

Mississippi. — Kline *v.* The State, 44 Missis. 317, 319.

Missouri. — The State *v.* Crabtree, 27 Misso. 232; The State *v.* Carpenter, 62 Misso. 594.

New York. — People *v.* Hoym, 20 How. Pr. 76.

North Carolina. — The State *v.* Williams, 4 Ire. 400; The State *v.* Howard, 67 N. C. 24.

Pennsylvania. — Johnston *v.* Commonwealth, 10 Harris, Pa. 102; Commonwealth *v.* Nesbit, 10 Casey, Pa. 398.

South Carolina. — The State *v.* Meyer, 1 Speers, 305; The State *v.* Helgen, 1 Speers, 310.

Virginia. — Thon *v.* Commonwealth, 31 Grat. 887.

West Virginia. — The State *v.* Baltimore and Ohio Railroad, 15 W. Va. 362.

[2] Mass. Pub. Stats. c. 98, § 2; Gen. Stats. c. 84, § 1.

[3] Ante, § 32.

[4] Commonwealth *v.* Collins, 2 Cush. 556.

[5] Ante, § 663 and note.

and selling[1] goods, wares, and merchandise in his said shop], the same then and there not being works of necessity or[2] of charity; against the peace, &c.[3]

§ 665. **Selling.** — Upon a statute to punish one who "shall, on Sunday, . . . retail any goods, wares, or merchandises, . . . or sell or retail any spirits or wine," the averments may be, —

That A, &c. on, &c. being Sunday [ante, § 653, 663], at, &c. unlawfully did sell by retail[4] to one X one yard of cloth [*or*, one pint of whiskey];[5] against the peace, &c.[6]

§ 666. **Unlawfully Entertaining.** — Where one who, "keeping a house, shop, cellar, or place of public entertainment and refreshment, entertains therein on the Lord's day any persons not being travellers, strangers, or lodgers, or suffers such persons on said day to abide or remain therein, or in the yards, orchards, or fields appertaining to the same, drinking,

[1] This does not make the indictment double. Crim. Proced. II. § 815.

[2] The conjunction in these negative averments should, *prima facie*, be "and" or "or" according as it is the one or the other in the statute. It is familiar doctrine, that, if it is "or" in the statute, it must be "or" in the allegation. Ante, § 642, note, and places referred to; Stat. Crimes, § 1043. So here, if the statute is to be interpreted literally, the work, to be excepted, must be *both* "of necessity *and* charity;" and the negative, to cover the exact idea, must be that it was not "of necessity and charity." Still, to declare that it was neither covers also the same idea and more. The precedents before me have "or" in this place. Shall we substitute for it "and?" I should say yes, because thus the averment will be absolutely accurate, were it not that the courts will perhaps interpret the "and" of the statute to signify "or." And there is strong reason to believe that they will. Stat. Crimes, § 243; Crim. Law, II. § 959. Should they so interpret it, "and" in this allegation would be fatal. So it is prudent to adhere to "or."

[3] For precedents see Commonwealth *v.* Wright, 12 Allen, 187; Commonwealth *v.* Lynch, 8 Gray, 384. Under the words "it shall not be lawful for any owner or occupier of any grocery store or retail shop, within the limits of Charleston Neck, &c., to keep open the said stores, shops, or places, or to trade, traffic, or barter therein, with negroes or persons of color, at any time on the Sabbath day," it is good in allegation to say, that the defendant, being the owner and occupier of such shop, "did keep open the same on the Sabbath day, and did trade, traffic, and barter therein, with negroes and persons of color." The State *v.* Meyer, 1 Speers, 305; The State *v.* Helgen, 1 Speers, 310. Where the thing forbidden is "keeping open any ale or porter house, grocery, or tippling-shop; and selling or retailing any fermented or distilled liquor, on," &c. it will be adequate in allegation to say, that the defendant "did then and there, on, &c. at, &c. unlawfully keep open a grocery, by then and there permitting persons to enter said grocery, and then and there to drink intoxicating liquors." The State *v.* Crabtree, 27 Misso. 232.

[4] As to the effect of the word "retail," see Stat. Crimes, § 1013, 1016, 1045, note.

[5] Probably, in a few of the States, the courts will require the allegation of price to be added. Ante, § 648, note; Stat. Crimes, § 1040.

[6] For precedents, see Bridges *v.* The State, 37 Ark. 224; Kline *v.* The State, 44 Missis. 317, 319; Reg. *v.* Howarth, 33 U. C. Q. B. 537.

or spending their time idly or at play, or in doing any secular business,"[1] is declared by statute punishable, the pleader may proceed on one of the alternative clauses, or conjunctively on two or more of them, as he deems best.[2] The form may be, for example, —

That A, &c. on, &c. being the Lord's day [ante, § 663], at, &c. was the keeper of a certain house [*or* shop, *or* cellar, *or* place] of public entertainment and refreshment,[3] and did then and there unlawfully [passing over one of the alternative clauses in the statute] suffer one X and one Y [*or* twenty persons whose respective names are to the jurors unknown], not being then and there travellers, strangers, or lodgers therein, to abide and remain therein, drinking and spending their time idly [*and*, there being now a complete offence charged, the pleader can, if he chooses, go back and take in clauses which he has passed over; as], and did then and there and therein entertain said X and Y [*or* said unknown persons]; against the peace, &c.[4]

§ 667. **Travelling** — is, or may be, within statutes forbidding ordinary labor.[5] But it has been sometimes prohibited in more direct terms; as, "no traveller, drover, wagoner, teamster, or any of their servants shall travel on the Lord's day or any part thereof, except from necessity or charity." And on these words it is a condensed yet ample form to say, —

That A, &c. on, &c. being the Lord's day [ante, § 663], at M, &c. did, being then and there a traveller, unlawfully, and not from necessity or

[1] Mass. Stat. 1864, c. 79, § 1.

[2] Crim. Proced. I. § 436; Stat. Crimes, § 244.

[3] In a form before me the allegation here is, "was the keeper of a certain house, shop, and place of public entertainment and refreshment." Commonwealth *v.* Crowther, 117 Mass. 116. If a place can be both a house and a shop, as probably it can, while certainly it can be either and likewise a place of public entertainment and refreshment, so that there is no repugnance, the incongruous averment does not render the indictment demurrable. But *query* whether the proofs must not show the place to have been all. See, for illustration, Crim. Proced. I. § 484, 588; II. § 439, 440. I think few who examine these cited sections and the cases they refer to will disregard this query, since in no view is anything gained by the incongruous allegation.

[4] Following substantially the precedent in Commonwealth *v.* Crowther, supra. For a form, not good, on a statute differently worded, see Commonwealth *v.* Maxwell, 2 Pick. 139. For keeping open a saloon on Sunday, Lynch *v.* People, 16 Mich. 472. The case of Commonwealth *v.* Maxwell admirably illustrates the principle (Crim. Proced. I. § 77–88) that an indictment must set out every fact which in law is essential to the punishment to be inflicted. The statute provided, that, for its violation, the defendant should pay a fine of so much "for each person so entertained or suffered." And the court quashed the indictment because it did not state the number of persons.

[5] Crim. Law, II. § 956, 960; Commonwealth *v.* Messenger, 4 Mass. 462, where may be found an awkward form for the averments.

charity, travel with a horse and wagon[1] in and through the said town of M, along the highway there; against the peace, &c.[2]

§ 668. **Work — ("Common Labor").** — A statute provides, that, "if any person of the age of fourteen years and upwards shall be found, on the first day of the week commonly called Sunday, rioting, hunting, fishing, quarrelling, at common labor, or engaged in their usual avocations, works of charity and necessity only excepted, such person shall be fined, &c.; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travellers, families removing, keepers of toll-bridges and toll-gates, and ferrymen, acting as such." By consulting rules stated elsewhere,[3] the reader will see that the indictment on this statute need not take notice of the part following the words "but nothing," yet it must negative the exceptions in the preceding clause. It may aver, —

That on, &c. being the first day of the week commonly called Sunday [ante, § 463], at, &c. A, &c. being then and there over the age of fourteen years,[4] was found unlawfully at common labor and engaged in his usual avocation, in that he did then and there unlawfully sell and deliver to one X two cigars, and receive from him in payment therefor the sum of ten cents[5] [*or*, to wit, selling and delivering to one X two quarts of beer, and receiving from him twenty-five cents in payment therefor], the same not being a work of necessity or[6] charity; against the peace, &c.[7]

§ 669. **Another.** — On the statute recited ante, § 664, the allegations may be, —

That A, &c. on, &c. being the Lord's day [ante, § 663], at, &c. did do and perform the labor, business, and work of [say what; as, for example] pitching into a cart certain sea-manure of kelp and hauling it up a beach there, the same not being a work of necessity or charity; against the peace, &c.[8]

[1] I think it well to aver the mode of travel, because it identifies the transaction. Still, in the absence of more conclusive authority than a precedent or two, one would hardly feel safe in declaring it to be strictly necessary.

[2] Commonwealth *v.* Knox, 6 Mass. 76.

[3] Crim. Proced. I. § 636–641.

[4] Crim. Proced. II. § 818.

[5] Ante, § 648, note, 665, note.

[6] As to whether this should be "or" or "and," see ante, § 664, note.

[7] For precedents, see Carver *v.* The State, 69 Ind. 61; Eitel *v.* The State, 33 Ind. 201; Yonoski *v.* The State, 79 Ind. 393, and various Indiana cases cited ante, § 663. Upon the Missouri statute, The State *v.* Carpenter, 62 Misso. 594. For a form in North Carolina, held ill because the offence was not indictable, see The State *v.* Williams, 4 Ire. 400. Against a railroad corporation for laboring on Sunday, The State *v.* Baltimore and Ohio Railroad, 15 W. Va. 362.

[8] Commonwealth *v.* Sampson, 97 Mass. 407.

§ 670. **Bowling Alley — (Gaming).** — Under a statute making punishable "the keeper for the time being of any billiard room or table, or of any bowling alley, who shall suffer any persons to play at the same after six o'clock in the afternoon of Saturday, or after ten o'clock in the afternoon of any other day," it is good to aver, —

That A, &c. on, &c. being Saturday [ante, § 663], at, &c. was the keeper for the time being of a certain bowling alley [there situate [1]], and did then and there suffer and permit certain persons whose names are to the jurors [*or* complainant] unknown, to play at and in the said bowling alley after the hour of six o'clock in the afternoon of said day; against the peace, &c.[2]

§ 671. **Other Forms,** — when required in practice, may easily be drawn in analogy to the foregoing.[3]

[1] Unnecessary. Ante, § 179, note, 253, note; Commonwealth *v.* Crowther, 117 Mass. 116.

[2] Commonwealth *v.* Colton, 8 Gray, 488. Perhaps some will say that Saturday is not Sunday, and so this precedent does not helong here. But the inhibition was intended as a sort of preparation for the Sabbath. **Cards.** — For playing at cards on Sunday, The State *v.* Anderson, 30 Ark. 131; The State *v.* Jeffrey, 33 Ark. 136.

[3] **Tippling-house.** — For keeping a tippling-house on Sunday, Werner *v.* The State, 51 Ga. 426. **Theatre,** — getting np a, on Sunday, People *v.* Maguire, 26 Cal. 635, 639. **Play,** — exhibiting, on Sunday, People *v.* Hoym, 20 How. Pr. 76. **Gun.** — Being found, on the Sabbath, off one's premises with a shot-gun, The State *v.* Howard, 67 N. C. 24.

CHAPTER LIII.

LOTTERIES.[1]

§ 672. **Formula for Indictment.** — The subject of this chapter, more distinctly than that of the last, presents such varying statutes, creating differing offences, as to render impossible any formula for the indictment, except what will be a mere apology for citing the cases containing precedents in the order of the States; thus, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80, *or*, if the offence should be an exceptional one of the continuing sort, aver as at ante, § 83, 84] did, &c. [say what, following the ordinary rules for indictments on statutes [2]]; against the peace, &c.[3]

[1] For the direct elucidations of the offences of setting up a lottery, selling the tickets, and the like, with the pleading, practice, and evidence, see Stat. Crimes, § 950–966. Incidental, Crim. Law, I. § 493; Crim. Proced. I. § 241, 569; Stat. Crimes, § 205, 207, 856.

[2] Crim. Proced. I. § 593–642.

[3] For precedents, see Rex *v.* Seale, 8 East, 568; Reg. *v.* Crawshaw, Bell C. C. 303, 8 Cox C. C. 375; Taylor *v.* Smetten, 11 Q. B. D. 207.

Alabama. — Marks *v.* The State, 45 Ala. 38, 41.

Connecticut. — The State *v.* Sykes, 28 Conn. 225.

Kentucky. — Commonwealth *v.* Bierman, 13 Bush, 345; Commonwealth *v.* Bull, 13 Bush, 656; Miller *v.* Commonwealth, 13 Bush, 731.

Maryland. — The State *v.* Scribner, 2 Gill & J. 246, 247; The State *v.* Barker, 2 Gill & J. 246, 248.

Massachusetts. — Commonwealth *v.* Clapp, 5 Pick. 41; Commonwealth *v.* Eaton, 15 Pick. 273; Commonwealth *v.* Dana, 2 Met. 329; Commonwealth *v.* Horton, 2 Gray, 69; Commonwealth *v.* Harris, 13 Allen, 534; Commonwealth *v.* Thacher, 97 Mass. 583.

Missouri. — The State *v.* Kennon, 21 Misso. 262; The State *v.* Woodward, 21 Misso. 265; The State *v.* McWilliams, 7 Misso. Ap. 99.

New Hampshire. — The State *v.* Follet, 6 N. H. 53.

New York. — People *v.* Sturdevant, 23 Wend. 418; Pickett *v.* People, 8 Hun, 83, 84; Read *v.* People, 86 N. Y. 381, 383; People *v.* Noelke, 94 N. Y. 137.

Oregon. — The State *v.* Dougherty, 4 Oregon, 200.

Pennsylvania. — Commonwealth *v.* Sylvester, Brightly, 331; Commonwealth *v.* Manderfield, 8 Philad. 457.

Texas. — Holoman *v.* The State, 2 Texas Ap. 610.

Virginia. — Phalen *v.* Commonwealth, 1 Rob. Va. 713; Payne *v.* Commonwealth, 31 Grat. 855.

§ 673. **Setting up or promoting Lottery.** — The statutes creating this offence differ in their terms. And the rule for the indictment is to cover the terms proceeded on, and descend so far into the particulars of the transaction as to individualize it.[1] Hence, under the simple words "shall establish a lottery, or dispose of any estate, real or personal, by lottery," it is good, and probably in some respects needlessly minute, to say, —

That A, &c. on, &c. at, &c. did, under the pretence of vending an article of personal property called candy, establish a lottery for the unlawful disposing and distributing of personal property, to wit, money, rings, and other articles of jewelry, by chance, by then and there exposing to sale divers candy-boxes at fifty cents each, which boxes the said A then and there represented to contain candy and prizes, and among various lots of said boxes an unspecified one of each lot to contain ten dollars, and others of said boxes to contain five dollars each [by which lottery the said A did then and there dispose of, to one X, ten dollars, the same being personal property, and to divers other persons certain personal property consisting of money, rings, and other articles to the jurors (*or* attorney, &c.) unknown and of values unknown [2]]; against the peace, &c.[3]

§ 674. **Another.** — Under the larger statutory expression, which the indictment must cover, "that no unauthorized person shall open, set on foot, carry on, promote, or draw, publicly or privately, any lottery, game, or device of chance, for the purpose of exposing, setting to sale, or disposing of any houses, lands, tenements, or real estate, or any money, goods, or things in action," it is adequate to allege, —

That A, &c. on, &c. at, &c. did, without any authority of law [publicly [4]] set on foot [*or*, carry on, *or* set on foot and carry on] a certain

[1] Stat. Crimes, § 964; People *v.* Taylor, 3 Denio, 91; Crim. Proced. I. § 568, 611–620.

[2] The matter within these brackets is in the form before me. But the analogies in criminal pleading indicate that it is unnecessary.

[3] Holoman *v.* The State, 2 Texas Ap. 610. For other precedents, see Miller *v.* Commonwealth, 13 Bush, 731; The State *v.* Dougherty, 4 Oregon, 200; Marks *v.* The State, 45 Ala. 38, 41. And see post, § 674, 675. Under the Virginia statute, it is good simply to charge, that A "unlawfully did set up and promote, and was concerned in managing and drawing, a certain lottery for the division of money and other things of value by chance and lot." Payne *v.* Commonwealth, 31 Grat. 855. It would seem not possible to reduce the indictment to much, if any, smaller proportions, without rendering it ill. Taking this for a guide, I see no reason why the indictment on the statute and under the facts in the text might not be, —

That A, &c. on, &c. at, &c. did unlawfully establish a certain lottery, for the sale and disposal, by chance and lot, of various articles of personal property, consisting of candy, money, bank-bills, rings, and other jewelry, and other things of value to the jurors unknown; against the peace, &c.

[4] "Publicly and privately," in this statute, is a clause of a sort not required to

lottery for the purpose of exposing money to be by the lot and chance of certain drawings disposed of and distributed to and among persons who should become purchasers of tickets therein, a more particular description of which lottery [and of the mode of carrying it on] is to the jurors unknown; against the peace, &c.[1]

§ 675. **Keeping Lottery.** — Under the words, "No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery whatsoever not authorized by Parliament;" [2] a form of allegation which has been treated as good is, —

That A, &c. on, &c. at, &c. unlawfully did keep in a tent a lottery to be drawn by lots and by coupons by a certain contrivance, to wit, the distributing of a quantity of parcels of tea with coupons in certain of such parcels, being a lottery not authorized by Parliament, to wit, a lottery for clocks and other articles; against the peace, &c.[3]

§ 676. **Permitting Lottery.** — Under a statute to punish one "who shall set up or promote any lottery, not authorized by law, for money, or shall dispose of any property of value, real or personal, by way of lottery," or "shall in any house, shop, or building owned or occupied by him, or under his control, knowingly permit the setting up, managing, or drawing of any such lottery," [4] it has been adjudged adequate to aver, —

That A, &c. on, &c. at, &c. did knowingly and unlawfully permit, in a house and building then and there actually used and occupied by him, the setting up of a lottery in which certain articles of personal property and of value were disposed of by the way of lottery; against the peace, &c.[5]

§ 677. **Selling Tickets.** — The precedents for the indictment are more numerous on this branch of the offence than on any

be incorporated into the allegations. Ante, § 175, 182 and note, 187 and note, 214, 255, 334 and note, 335 and note; Crim. Proced. I. § 614. Still some pleaders might choose to insert the proper one of these words for caution.

[1] People *v.* Taylor, 3 Denio, 91.

[2] 42 Geo. 3, c. 119, § 2.

[3] Taylor *v.* Smetten, 11 Q. B. D. 207.

[4] Mass. R. S. c. 132, § 1.

[5] Commonwealth *v.* Horton, 2 Gray, 69. One of the objections urged against this indictment was, that, by the terms of the statute, its inhibition extended only to lotteries "not authorized by law for money." But the court gave the statutory words the wider interpretation. Other objections were made, but overruled. Plainly not much could be taken from this form and leave it good. For a similar form sustained under the Virginia statute, see Payne *v.* Commonwealth, 31 Grat. 855.

other. But they greatly differ, particularly in their setting out of the tickets. In reason, the description of them need correspond only to that of writings stolen,[1] and the averments of the sale may follow those for the unlicensed vending of intoxicating liquors.[2] The tenor of the ticket is not of the essence of the offence, like the tenor of the writing in forgery and libel, therefore it need not be averred. Yet the terms of the statute should be covered, and from the whole setting out the particular ticket should appear to be within them as judicially interpreted.[3] While many of the precedents charge more, there is not much judicial authority indicating that more is required.[4] Thus, under the statutory words "sell or offer for sale . . . any lottery ticket or tickets, or part or parts of any lottery ticket or tickets," averments substantially as follows were on demurrer adjudged good:—

That A, &c. on, &c. at, &c. did unlawfully offer for sale, and did unlawfully sell, to one X, one half of a lottery ticket in a lottery not authorized by the laws of this Commonwealth,[5] called [for example] the Connecticut lottery for the erection of a bridge at Enfield Falls; against the peace, &c.[6]

[1] Ante, § 601–605.

[2] Ante, § 648, 649.

[3] Ante, § 32.

[4] Stat. Crimes, § 962. But see The State *v.* Scribner, 2 Gill & J. 246.

[5] An averment that the particular lottery was not authorized by law is unnecessary in a State where no lotteries are authorized. Stat. Crimes, § 964; People *v.* Sturdevant, 23 Wend. 418. Yet, in some circumstances, I should perhaps choose to retain this allegation, or to insert "unlawful" before "lottery," as aiding the meaning that the particular lottery is not of some possible lawful sort. But — can there be a lawful lottery where all lotteries are by statute declared unlawful?

[6] Commonwealth *v.* Eaton, 15 Pick. 273. So, in The State *v.* Follet, 6 N. H. 53, it was adjudged good to aver, —

That A, &c. on, &c. at, &c. unlawfully did sell to one X a part of a ticket, that is to say, one quarter part of a ticket, at and for the price of fifty cents [as to price, see ante, § 648, note], in a certain lottery not authorized, &c.; against the peace, &c.

In this case the court said: "It is insisted that the indictment is insufficient because the ticket, a part of which was sold, is not described, nor the lottery to which it belonged stated. . . . If there were no tickets in any lottery which were not within the prohibition of the statute, the crime is here alleged with sufficient certainty. For in that case it is wholly immaterial what kind of a ticket was sold, and to what lottery it belonged. When the sale of all tickets is prohibited, it must be mere surplusage to describe in the indictment either the ticket or the lottery. But if there were any tickets, in any lottery, which might be lawfully sold in this State, the indictment is defective. In that case it ought to be alleged what the tickets were, or at least to what lottery they belonged, that it might be seen whether the sale was lawful or not."

Again, under the statutory words "sell, &c. any lottery ticket or tickets, or any share or part of any lottery ticket or tickets in any lottery, or device in the nature of a lottery," the averments were, in The State *v.* Kennon, 21 Misso. 262, and see The State *v.* Woodward, 21 Misso. 265, adjudged good, —

That A, &c. on, &c. at, &c. unlawfully did sell divers, to wit, ten tickets in a certain device in the nature of a lottery, called a raffle, to certain persons to the jurors unknown, for the price and sum of three dollars

§ 678. **Having for Sale.** — Upon the statutory words "shall have in his possession, with intent to sell or to offer for sale, &c. a ticket in any such [that is, not authorized by law, &c. the statute quoted ante, § 676] lottery," &c.[1] the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully have in his possession, with intent to offer for sale and to sell, five hundred certain lottery tickets, and five hundred shares, to wit, halves and quarter lottery tickets and shares of tickets, in a certain lottery for money [*or*, for the disposition of, &c.[2]] not authorized by law, called, &c.; against the peace, &c.[3]

§ 679. **Advertising Tickets.** — There is, in the present state of the authorities, some room for doubt as to what allegations are necessary.[4] One of the cases seems to imply, that, on the statutory words "advertise for sale any lottery ticket or tickets, or part or parts of any lottery ticket or tickets," it is sufficient to charge, —

That A, &c. on, &c. at, &c. did advertise in a certain newspaper by him published, called the, &c. [giving the name], lottery tickets and parts of lottery tickets for sale, in lotteries not authorized by the laws of this State; against the peace, &c.[5]

for each of said tickets, which raffle was then and there created for the purpose of disposing of a farm of land, a piano, and divers other property the description whereof is to the jurors unknown; against the peace, &c.

For other precedents, see Payne *v.* Commonwealth, 31 Grat. 855; Commonwealth *v.* Phalen, 1 Rob. Va. 713; Commonwealth *v.* Bull, 13 Bush, 656; Commonwealth *v.* Bierman, 13 Bush, 345; The State *v.* Sykes, 28 Conn. 225; The State *v.* McWilliams, 7 Misso. Ap. 99; Commonwealth *v.* Sylvester, Brightly, 331 (including conspiracy to sell); Commonwealth *v.* Manderfield, 8 Philad. 457; People *v.* Sturdevant, 23 Wend. 418; Pickett *v.* People, 8 Hun, 83, 84; Read *v.* People, 86 N. Y. 381, 383; People *v.* Noelke, 94 N. Y. 137.

[1] Mass. R. S. c. 132, § 2.

[2] Crim. Proced. I. § 569.

[3] Commonwealth *v.* Dana, 2 Met. 329. And see Stat. Crimes, § 963. For other precedents, Commonwealth *v.* Harris, 13 Allen, 534; Commonwealth *v.* Thacher, 97 Mass. 583.

[4] Stat. Crimes, § 962 *a*.

[5] Commonwealth *v.* Clapp, 5 Pick. 41. And compare with Stat. Crimes, ut sup. Publishing, in this State, an account of a lottery to be drawn in another, Charles *v.* People, 1 Comst. 180.

For MAIL, see POST-OFFICE OFFENCES.
MAIM, see MAYHEM.
MAINTENANCE, see CHAMPERTY AND MAINTENANCE.

CHAPTER LIV.

MALFEASANCE AND NON-FEASANCE IN OFFICE.[1]

§ 680. **Formula for Indictment.** — The indictment for this offence varies with the particular nature of the offending, as well as with the special facts. The allegations common to all the cases may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], then being the sheriff of the said county of, &c. [*or*, one of the constables of said town of, &c. *or*, &c. stating the particular office, and following therein the terms of the statute creating it, as being, at least, practically best], did, &c. [setting out the facts which constitute the crime]; against the peace, &c. [ante, § 65–69].[2]

[1] For the direct expositions of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 971–982; Crim. Proced. II. § 819–836. Incidental, Crim. Law, I. § 218, 240, 299, 316, 321, 459–464, 468 *a*, 707; II. § 256, 392, 394–400, 631, 644, 653, 655; Crim. Proced. I. § 555, 637; Stat. Crimes, § 256, 805, 806, 839, 969, 976. And see BRIBERY — ESCAPE (under title Prison Breach, &c.) — EXTORTION — REFUSING OFFICE.

[2] For forms and precedents, see 11 Cox C. C. App. 1; 2 Chit. Crim. Law, 153, 236–266, 279, 283–286; 3 Ib. 666, 669, 697, 698, 701–713; 4 Went. Pl. 125–148, 345, 347, 364, 418, 424; 6 Ib. 455; Trem. P. C. 230–236, 247, 249, 261; Rex *v.* Bembridge, 22 Howell St. Tr. 1, 15, 3 Doug. 327; Rex *v.* Davison, 31 Howell St. Tr. 99; Rex *v.* Jones, 31 Howell St. Tr. 251; Rex *v.* Wetherill, Cald. 432; Rex *v.* Commings, 5 Mod. 179; Rex *v.* Sainsbury, 4 T. R. 451; Rex *v.* Dobson, 7 East, 218; Rex *v.* Cope, 6 A. & E. 226, 7 Car. & P. 720; Rex *v.* Meredith, Russ. & Ry. 46; Reg. *v.* Dale, Dears. 37, 6 Cox C. C. 93; Rex *v.* Whitcomb, 1 Car. & P. 124; Rex *v.* Pinney, 5 Car. & P. 254; Rex *v.* Kennett, 5 Car. & P. 282; Rex *v.* Antrobus, 6 Car. & P. 784; Douglas *v.* Reg. 3 Cox C. C. 163.

Alabama. — Diggs *v.* The State, 49 Ala. 311; Sanders *v.* The State, 55 Ala. 183, 184; McCullough *v.* The State, 63 Ala. 75.

Arkansas. — Mahar *v.* The State, 28 Ark. 207, 208; McClure *v.* The State, 37 Ark. 426; Griffin *v.* The State, 37 Ark. 437, 439.

Florida. — Snowden *v.* The State, 17 Fla. 386.

Georgia. — Hawkins *v.* The State, 54 Ga. 653.

Illinois. — Zorger *v.* People, 25 Ill. 193.

Indiana. — Lathrop *v.* The State, 6 Blackf. 502; The State *v.* Moses, 7 Blackf. 244; The State *v.* Shields, 8 Blackf. 151; The State *v.* Hunter, 8 Blackf. 212; The State *v.* Odell, 8 Blackf. 396; The State *v.* Williams, 4 Ind. 393; The State *v.* Record, 56 Ind. 107; Baker *v.* The State, 57 Ind. 255.

Iowa. — The State *v.* Conlee, 25 Iowa, 237; The State *v.* Stiles, 40 Iowa, 148.

Kentucky. — Commonwealth *v.* Williams, 79 Ky. 42.

§ 681. **Common English Form — (Neglect of Constable).** — The following, believed to contain a large proportion of needless allegation, is from the current books of English practice: —

That on, &c. at the parish of N, in the county of M, A, &c. then being one of the constables of the said parish, brought one X before Y, esquire, then and yet being one of the justices of our said Lady the Queen, assigned to keep the peace for our said Lady the Queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said X then and there was charged before the said Y by one Z, spinster, upon the oath of the said Z, that he the said X had then lately before violently, and against her will, feloniously ravished and carnally known her the said Z; and the said X was then and there examined before the said Y, the justice aforesaid, touching the said offence so to him charged as aforesaid; upon which the said Y, the justice aforesaid, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date the said third day of August, in the year aforesaid, directed to the keeper of Newgate or his deputy, commanding him the said keeper or his deputy, that he should receive into his custody the said X, brought before him and charged upon the oath of the said Z with the premises above specified; and the said justice, by the said warrant, did command the said keeper of Newgate, or his deputy, to safely keep him the said X there until he by due course of law should be discharged; which said warrant afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, was

Maine. — The State *v.* Leach, 60 Maine, 58, 59.

Maryland. — Hiss *v.* The State, 24 Md. 556, 560.

Massachusetts. — Commonwealth *v.* Woods, 11 Met. 59.

Minnesota. — The State *v.* Wedge, 24 Minn. 150, 152.

Michigan. — People *v.* Tryon, 4 Mich. 665; Wattles *v.* People, 13 Mich. 446.

Missouri. — The State *v.* Brewer, 8 Misso. 373; The State *v.* Hein, 50 Misso. 362; The State *v.* O'Gorman, 68 Misso. 179.

New Hampshire. — The State *v.* Smith, 20 N. H. 399; The State *v.* Hoit, 3 Fost. N. H. 355; The State *v.* Woodbury, 35 N. H. 230.

New York. — People *v.* Walbridge, 6 Cow. 512; People *v.* Castleton, 44 How. Pr. 238; People *v.* Bogart, 3 Abb. Pr. 193; People *v.* Bogart, 3 Parker C. C. 143, 145; People *v.* Weston, 4 Parker C. C. 226, Sheldon, 555, 556.

North Carolina. — The State *v.* Glasgow, Conference, 38; The State *v.* Lenoir Justices, 4 Hawks, 194; The State *v.* Leigh, 3 Dev. & Bat. 127; The State *v.* Williams, 12 Ire. 172; The State *v.* Zachary, Busbee, 432; The State *v.* Sneed, 84 N. C. 816.

Pennsylvania. — Conner *v.* Commonwealth, 3 Binn. 38; Wilson *v.* Commonwealth, 10 S. & R. 373; Commonwealth *v.* Rupp, 9 Watts, 114; Commonwealth *v.* Reiter, 28 Smith, Pa. 161.

South Carolina. — The State *v.* Hall, 5 S. C. 120, 121.

Tennessee. — The State *v.* Buxton, 2 Swan, Tenn. 57; The State *v.* Jones, 2 Lea, 716.

Texas. — Searcy *v.* The State, 4 Texas, 450; The State *v.* Mathis, 30 Texas, 506; The State *v.* Baldwin, 39 Texas, 155; Gordon *v.* The State, 2 Texas Ap. 154; Gray *v.* The State, 7 Texas Ap. 10.

Vermont. — The State *v.* Northfield, 13 Vt. 565.

Virginia. — Commonwealth *v.* Mann, 1 Va. Cas. 308; Old *v.* Commonwealth, 18 Grat. 915.

delivered to the said A, then being one of the constables of the said parish as aforesaid, and then and there having the said X in his custody for the cause aforesaid; and the said A was then and there commanded by the said Y, the justice aforesaid, to convey the said X, without delay, to the said jail of Newgate, and to deliver him the said X to the keeper of the said jail, or his deputy, together with the warrant aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A, late of the parish aforesaid, in the county aforesaid, baker, so being one of the constables of the said parish as aforesaid, and being so commanded by the said Y the said justice, as aforesaid, then and there unlawfully and contemptuously did neglect and refuse to convey the said X to the said jail of Newgate, as he the said A by virtue of his office aforesaid by law should and ought to have done; to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace, &c.[1]

§ 682. **As to which — Condensed, &c.** — Looking at our own practice, there can be no need of setting out the functions of the justice of the peace, for they are regulated by statutes which are judicially known. And for reasons stated elsewhere,[2] it is believed that the court of an examining magistrate is not to be deemed of inferior jurisdiction within the rule requiring the jurisdictional facts to appear in allegation. Still, as this proposition might be controverted, the careful pleader will be likely, in the absence of express adjudication, to allege them in order to avoid a troublesome question at the trial and afterward. But surely it cannot be necessary to aver any command by the magistrate to the officer, other than is contained in the written mittimus. Casting away, therefore, from the foregoing precedent its palpable surplusage, retaining the substance of the jurisdictional allegation, and adapting all to American use, we have the following, which the pleader in some of the States may still be required to vary a little to suit the practice in his own State: —

That on, &c. at, &c. A, &c. being then one of the constables of the said town of N in the county of M, and Y, esquire, being then one of the justices of the peace of said county, one X was by the said A brought before the said Y, charged by one Z upon her oath that then lately before, in said county, the said X had violently and against her will feloniously ravished and carnally known her; whereupon the said Y, acting as said justice of the peace, and having considered of the premises, made in due form of law a warrant under his hand and seal commanding, &c. [reciting its substance

[1] Archb. Crim. Pl. & Ev. 10th ed. 582, 19th ed. 892.
[2] Crim. Proced. I. § 236–239.

after the manner of the foregoing precedent], and then and there delivered the same to the said A; but the said A did then and there unlawfully and contemptuously neglect and refuse to convey the said X to the jail, &c. [following the warrant], as he the said A ought by command of said warrant to have done; against the peace, &c.

§ 683. **Disobeying Statutory Command.** — Under this head we have one of the most frequent illustrations of the doctrine,[1] that, where a statute enjoins or forbids a thing of a public nature, but provides no penalty, disobedience is, therefore, a common-law misdemeanor. So that, in the words of a learned judge, "public officers are liable to indictment for any gross neglect of official duty, when no penalty otherwise recoverable is prescribed by law."[2] Hence, —

§ 684. **Selectmen not Appointing — (Liquor Selling).** — If a statute directs, that "the selectmen of every town and place, in the month of April in each year, shall appoint one or more suitable persons, not exceeding three, agents for such town or place for the purchase of spirituous and intoxicating liquors, and for the sale thereof within such town or place, to be used in the arts, or for medicinal, mechanical, and chemical purposes, and for no other use or purpose whatever," and they make no appointment, they are indictable. Allegations held good are, omitting something of what is certainly not material, —

That at an annual meeting of the legal voters of the town of N in the county of M, which, after due notification, was duly and legally holden in said N, on, &c. for the choice of State and county officers and of all necessary town officers of said town and for other purposes, A, &c. B, &c. and C, &c. were in due form of law elected selectmen of said town for the year then commencing, and were then and there duly qualified and sworn to do and perform all the duties of selectmen of the said town for the then

[1] Crim. Law, I. § 237–239; Stat. Crimes, § 138.

[2] Bell, J. in The State *v.* Woodbury, 35 N. H. 230, 232. Thus, the English statute of 43 Eliz. c. 2, § 2, 4, provided that churchwardens and overseers of the poor should, at times specified, "make and yield up to two justices of the peace a true and perfect account of all sums of money by them received," in default whereof the justices might commit them until they obeyed. But nothing was said of any further penalty. Thereupon it was held, that they were also indictable; for, said the court, "their refusal is a contempt of the law. . . . And, as to that, there is no difference when a thing is enjoined and when it is prohibited by a statute; for when it is prohibited the party shall not only have his action for the injury done, but the offender shall be punished at the king's suit for the contempt of his law. It is true, two justices of peace have power to commit the overseers refusing to account, which is a proper means to come at the right; but it does not satisfy the king for the contempt." Rex *v.* Commings, 5 Mod. 179, 180.

ensuing year, and did then and there enter upon and commence the duties of said office, and ever since continually have acted and still act as selectmen of said town;[1] whereupon it became and was their duty, as such selectmen, in the month of April last past, to appoint one or more suitable persons, not exceeding three, agents for said town for the purchase of spirituous and intoxicating liquors, and for the sale thereof within said town, to be used in the arts, and for medicinal, mechanical, and chemical purposes, and wine for the commemoration of the Lord's Supper, and for no other use or purpose whatever;[2] nevertheless the said A, B, and C, at N aforesaid, well knowing their duty in this behalf, but in nowise regarding it, did unlawfully, knowingly, and wilfully neglect and refuse, during all the month of April last past, to appoint any suitable person or[3] persons agent or agents for said town of N for the purpose aforesaid, and thence continually until the day of the finding of this indictment have so as aforesaid neglected and refused and still do so as aforesaid neglect and refuse; against the peace, &c.[4]

[1] As to whether selectmen, to commit this offence, must hold their office *de jure*, or whether their being selectmen *de facto* will suffice, see Crim. Law, I. § 464. If the latter, plainly the indictment for this offence need not set out their election, or their being sworn into office; but it will be adequate to allege "that A, &c. B, &c. and C, &c. on, &c. at, &c. being then and there the selectmen of the town of N," proceeding with the rest of the indictment. And, according to my understanding, this might well be held to suffice even if the selectmen cannot be holden unless they are such *de jure*. The reason is, that proof of their acting in the office, before, after, and at the time of the imputed neglect, is *prima facie* evidence that they were officers *de jure*. Crim. Proced. I. § 1130. And only a *prima facie* case is required to be alleged. Ib. § 326, 513; a defect in the title being, if available, for the defendant to set up. Now, if this reasoning fails to satisfy the inquirer, his objection will be, that the presumption of office arises from the presumption of innocence, hence it cannot be evoked where the direct object is to prove guilt. Ib. § 1130. And see the question elucidated I Bishop Mar. & Div. § 434–449. If, in this case, the selectmen, on being called upon to appoint the agent, had thrown up their office and ceased to act therein, I concede that their having acted therein would not be sufficient evidence of their title to constitute *prima facie* guilt in refusing longer to act. But where the refusal is simply to do a particular thing, while they cling to the office and perform its other functions, the doctrine which would require further evidence of title does not, I submit, apply. Their claiming title, at the very time of refusing to do the particular thing, and claiming it subsequently, should be deemed *prima facie* evidence of title, even to charge them with crime. Still I do not put forward this reasoning as absolutely conclusive. There are analogies in the law of evidence having, at least, a sort of seeming of being against it; as, for example, if, while a man is living with a woman as his wife, he has carnal knowledge of another woman, the fact of marriage, not the mere living together, must under the common-law rules be proved on the indictment for adultery. Stat. Crimes, § 687, and places there referred to. See ante, § 681; post, § 685; Crim. Proced. II. § 822, 823.

[2] This allegation of duty, being matter of law, is, of course, not necessary. But it gives distinctness to the other averments, for which reason many pleaders will choose to retain it. And see post, § 734 and note.

[3] Ante, § 642, note.

[4] The State *v.* Woodbury, 35 N. H. 230. The pleader will be quite likely to conclude as against the form of the statute. And since this conclusion can be rejected as surplusage (Crim. Proced. I. § 601), no harm will ensue therefrom. But this indictment, though drawn upon the statute, is, in fact, at common law. See the places cited ante, § 683.

§ 685. **Justice of Peace not making Returns.** — A statute made it the duty of every justice of the peace "to file an abstract of all the misdemeanors tried before him with the clerk of his county on or before the first day of the succeeding term of the Circuit Court, giving the style of the case, the nature of the offence, how he obtained jurisdiction of the case, whether the defendant was acquitted or convicted, and if convicted the amount of the fine or punishment imposed;" and provided a punishment for disobedience. Thereupon an indictment, much briefer than the somewhat abridged one of the last section, was sustained; thus, —

That A, &c. on, &c. at, &c. being then and there a justice of the peace of N township, in said county, did, on and before said day, the same being the day fixed by law for the commencement of the Circuit Court of said county for the present term thereof [well knowing his duty in this behalf [1]], wilfully and corruptly fail, and since hitherto has wilfully and corruptly failed, to file with the county clerk of said county an abstract of all misdemeanors tried before him the said A, as said justice of the peace, since the last term of the said court, giving the style of the case, the nature of the offence, how he obtained jurisdiction thereof, whether the offender was acquitted or convicted, and if convicted the amount of the fine or punishment imposed [and so the said A, a justice of the peace as aforesaid, is guilty of non-feasance in office, in manner and form aforesaid [2]]; against the peace, &c.[3]

§ 686. **Other Forms.** — Enough has already been given to indicate with precision the manner of setting out this class of offences. The common-law covers many varieties of the wrong, and the statutes are numerous. But the pleader would derive only slight help from a multiplication of forms. The following enumeration of heads will be helpful in respect of the references to precedents in the books: —

§ 687. **Not Accounting, not Paying, &c.** — For various failures to account for money received in office, or to pay it over, and for misappropriations of funds, and the like, see the note.[4]

[1] The matter in these brackets is not in the form before me. But there being ground for saying that official wrong-doing must, to be indictable, be with actual knowledge of the law (Crim. Law, II. § 977, and places there referred to), it may be safer to insert this averment.

[2] Not necessary under the common-law rules. Crim. Proced. II. § 548, 550.

[3] McClure *v.* The State, 37 Ark. 426. For another form under a like statute, see The State *v.* Baldwin, 39 Texas 155.

[4] Ante, § 409, 685. Overseer of poor applying earnings of the workhouse to his own use, 3 Chit. Crim. Law, 701. Same,

§ 688. **Bail,** — offences relating to.[1]

§ 689. **Jurisdiction,** — acting out of.[2]

§ 690. **Refusing and Neglecting,** — various acts of.[3]

making false accounts and swearing to them, Ib. 701, 704. Surveyor of highways using on own premises materials obtained for repairing them, Ib. 666. Officer not paying over money received, Rex *v.* Martin, Trem. P. C. 249. Accountant in disbursing office making out a false account, Rex *v.* Bembridge, 3 Doug. 327, 22 Howell St. Tr. 1, 15. Justice of peace not reporting a fine he had collected, The State *v.* Moses, 7 Blackf. 244. Superintendent of highways failing to make return of fine received, The State *v.* Shields, 8 Blackf. 151. Clerk of court not paying over moneys, The State *v.* Record, 56 Ind. 107. Attorney refusing to pay over money collected by him, People *v.* Tryon, 4 Mich. 665. County clerk failing to make report, The State *v.* Jones, 2 Lea, 716. Misconduct in the auditing of certain accounts, People *v.* Castleton, 44 How. Pr. 238. Justice of peace refusing to deliver property alleged to be stolen to its owner after release of supposed thief, Hiss *v.* The State, 24 Md. 556, 560. Clerk of magistrate's court neglecting to pay over moneys officially received, Reg. *v.* Dale, Dears. 37, 6 Cox C. C. 93. Constable withholding school fund, Mahar *v.* The State, 28 Ark. 207, 208. Other frauds on government, Rex *v.* Davison, 31 Howell St. Tr. 99; Rex *v.* Jones, 31 Howell St. Tr. 251.

[1] Bailing officer taking insufficient sureties, 2 Chit. Crim. Law, 244; 4 Went. Pl. 418. State's attorney corruptly approving a bail bond, and ordering prisoner's discharge, having no authority so to do, The State *v.* Wedge, 24 Minn. 150, 152. Justice of peace corruptly bailing, without authority, one committed by another magistrate, People *v.* Bogart, 3 Parker C. C. 143, 145, 3 Abb. Pr. 193. Same, causing one to be imprisoned for want of bail, in a matter not within his cognizance, 2 Chit. Crim. Law, 238.

[2] Ante, § 688, note. Weigher of vessels exercising his office beyond the limits of his jurisdiction, Commonwealth *v.* Woods, 11 Met. 59. Justice of peace ordering a woman to be publicly whipped as a disorderly person, without any view, information, or proof against her, 2 Chit. Crim. Law, 236.

[3] Not issuing precept, 2 Chit. Crim. Law, 257; 4 Went. Pl. 347. Constable refusing assistance to another constable in securing offender as verbally ordered by magistrate, 2 Chit. Crim. Law, 153. Refusing to convey to prison one committed by magistrate, 2 Chit. Crim. Law, 260. Neglecting to execute warrants, Conner *v.* Commonwealth, 3 Binn. 38; People *v.* Weston, Sheldon, 555, 556, 4 Parker C. C. 226. Sheriff refusing to execute criminal, Rex *v.* Antrobus, 6 Car. & P. 784. Jailer refusing to receive a prisoner committed by a magistrate, Rex *v.* Cope, 6 A. & E. 226, 7 Car. & P. 720. Neglect to repair jail, The State *v.* Lenoir Justices, 4 Hawks, 194; 3 Chit. Crim. Law, 669. Justice of peace refusing to issue warrant of arrest, The State *v.* Leigh, 3 Dev. & Bat. 127. Neglects to suppress riot, Rex *v.* Pinney, 5 Car. & P. 254; Rex *v.* Kennett, 5 Car. & P. 282. Supervisors of highways, neglects, &c. of, Zorger *v.* People, 25 Ill. 193; 2 Chit. Crim. Law, 285. Directors of turnpike company failing to make a public statement, Baker *v.* The State, 57 Ind. 255. Overseers of poor neglecting to provide for pauper, &c. The State *v.* Hoit, 3 Fost. N. H. 355; Rex *v.* Meredith, Russ. & Ry. 46; 2 Chit. Crim. Law, 279; The State *v.* Williams, 12 Ire. 172. Coroner refusing to take inquisition, 2 Chit. Crim. Law, 255. Refusing to return inquisition according to the evidence, Ib. Constable, neglecting to return presentments, 2 Ib. 261. Same, not appointing watch, &c. 2 Chit. Crim. Law, 261. Omitting otherwise to perform duty as constable, Old *v.* Commonwealth, 18 Grat. 915. Justice of peace refusing copy of his proceedings, Wilson *v.* Commonwealth, 10 S. & R. 373. Not estreating forfeited recognizances, Rex *v.* Lee, Trem. P. C. 247. Refusing to administer oath to challenged voter, Wattles *v.* People, 13 Mich. 446. Assessor neglecting to swear one to his inventory of taxable property, Searcy *v.* The State, 4 Texas, 450. Same, not calling on a person for a list of his taxable property, The State *v.* Hunter, 8 Blackf. 212. Neg-

§ 691. **Misdoings — of various sorts.**[1]

§ 692. **In Conclusion,** — though the forms of this offending are numerous, the pleader will find adequate help in the expositions of this chapter, even though he should not consult the places referred to in the notes.

lect of town to assess school tax, The State *v.* Northfield, 13 Vt. 565. Road, supervisors neglecting to open, Commonwealth *v.* Reiter, 28 Smith, Pa. 161. Neglecting to put up mile-posts, The State *v.* Mathis, 30 Texas, 506.

[1] Clerk making false record, 3 Chit. Crim. Law, 712. Justice of peace illegally discharging one committed by another magistrate, 2 Chit. Crim. Law, 239, 241. License, unlawfully granting or refusing, 2 Chit. Crim. Law, 249, 253; 4 Went. Pl. 364; 6 Ib. 455; Rex *v.* Sainsbury, 4 T. R. 451. Fraudulently issuing a land-warrant, The State *v.* Glasgow, Conference, 38. Prosecuting attorney accepting bribe, Diggs *v.* The State, 49 Ala. 311. And see title BRIBERY. Counsellor betraying client's cause and taking fees from the other side, and communicating to the other side the secrets of the cause, Rex *v.* Walker, Trem. P. C. 261. Officer unlawfully receiving presents, 3 Chit. Crim. Law, 697. Returning inquisition of murder when in fact none was found, Rex *v.* Deeds, Trem. P. C. 233. Wrongfully proclaiming martial law, &c. 11 Cox C. C. App. 1. Sheriff wrongfully bidding in property at sale, The State *v.* Williams, 4 Ind. 393. Attorney buying promissory note contrary to statute, People *v.* Walbridge, 6 Cow. 512. Register of deeds making false certificate that certain lands are unincumbered, The State *v.* Leach, 60 Maine, 58, 59. Collector unlawfully demanding money under color of office, Rex *v.* Dobson, 7 East, 218. See EXTORTION. Maltreatment of convict, Sanders *v.* The State, 55 Ala. 183, 184. Same of pauper, Rex *v.* Wetherill, Cald. 432. Officer in land office unlawfully purchasing public lands, Gray *v.* The State, 7 Texas Ap. 10. Coroner persuading jury to return untrue verdict, Rex *v.* Cross, Trem. P. C. 236. Other malpractice of coroner, Rex *v.* Whitcomb, 1 Car. & P. 124. Register engaging as proctor, 3 Chit. Crim. Law, 698. Justice of peace getting drunk, Commonwealth *v.* Mann, 1 Va. Cas. 308. See DRUNKENNESS; also Stat. Crimes, § 976. Various malpractices by justice of peace, The State *v.* Hein, 50 Misso. 362; The State *v.* Zachary, Busbee, 432; Snowden *v.* The State, 17 Fla. 386. Grand juror disclosing the evidence, The State *v.* Brewer, 8 Misso. 373. Overseers of poor misconducting, The State *v.* Smith, 20 N. H. 399. School directors and commissioners the same, The State *v.* Stiles, 40 Iowa, 148; Lathrop *v.* The State, 6 Blackf. 502. County commissioners the same, Commonwealth *v.* Rupp, 9 Watts, 114.

CHAPTER LV.

MALICIOUS INJURIES TO THE PERSON.[1]

§ 693. **Elsewhere.** — The title of the present chapter does not appear in the other volumes of this series. But the subject is treated of in various connections under the other titles, references to which, including two forms in the present volume, are given in the note.

§ 694. **Inflicting Grievous Bodily Harm** — is a form of the offence the indictment for which has already, in this volume, been given in outline.[2] Some further precedents may be found at the places referred to in the note.[3]

§ 695. **Malicious Shooting.** — Some cases under this title, in a part of which there are precedents, are referred to in the note.[4]

§ 696. **Cutting — Stabbing — Wounding.** — As to the indictment for, see note.[5]

[1] See Crim. Law, I. § 340, 758, 865, 867; II. § 53, 72 *a*, 72 *e*, 991, 1004; Crim. Proced. I. § 468, 613, 629, note; II. § 65; Stat. Crimes, § 135, 216, 314, 315, 318, 322–324; ante, § 19, note, 214. And see ASSAULT AND BATTERY — KIDNAPPING AND FALSE IMPRISONMENT — MAYHEM AND STATUTORY MAIMS.

[2] Ante, § 19, note, 214.

[3] 6 Cox C. C. App. 27, 28; Reg. *v.* Oliver, Bell C. C. 287, 8 Cox C. C. 384; Reg. *v.* Martin, 8 Q. B. D. 54, 14 Cox C. C. 633; Rex *v.* Arnold, 16 Howell St. Tr. 695; Rex *v.* Wood, 1 Moody, 278.

[4] Coal-Heavers' Case, 1 Leach, 4th ed. 64; Rex *v.* Davis, 1 Leach, 4th ed. 493; Reg. *v.* Cox, 3 Cox C. C. 58; Bland *v.* Commonwealth, 10 Bush, 622; Burns *v.* Commonwealth, 3 Met. Ky. 13; People *v.* Dunkel, 39 Mich. 255; Allen *v.* The State, 4 Baxter, 21; Hoback *v.* Commonwealth, 28 Grat. 922; The State *v.* Newsom, 13 W. Va. 859; Rex *v.* Arnold, supra.

[5] 6 Cox C. C. App. 28; Rex *v.* Amarro, Russ. & Ry. 286; Rex *v.* Williams, 1 Moody, 387; Rex *v.* Fraser, 1 Moody, 419; Erle's Case, 2 Lewin, 133; Reg. *v.* Miller, 14 Cox C. C. 356; The State *v.* Williams, 30 La. An. 1162; Boyd *v.* The State, 4 Baxter, 319; Starks *v.* The State, 7 Baxter, 64; Jones *v.* Commonwealth, 31 Grat. 830; Rex *v.* Wood, supra; Rex *v.* Briggs, 1 Moody, 318, 1 Lewin, 61.

CHAPTER LVI.

MALICIOUS MISCHIEF.[1]

§ 697. **How Chapter divided.** — We shall consider the forms for malicious mischief, I. In General; II. At the Common Law; III. To Animals under Statutes; IV. To other Personal Property under Statutes; V. To the Realty under Statutes; concluding with, VI. Practical Suggestions.

I. *In General.*

§ 698. **Wide and Uncertain Limits.** — The offence of malicious mischief, even at the common law, and especially as enlarged by multitudes of statutes, is of wide range yet of indistinct outline and limits. There are many indictable wrongs of which one hesitates to say whether they are to be termed malicious mischief or to stand with the unnamed. Of these, the author has placed, perhaps too many, perhaps not enough, in the present chapter.

§ 699. **Formula for Indictment.** — The indictment is analogous to that for larceny. Yet it varies more with the special facts; and, being commonly on a statute, it must cover the particular statutory terms. Its averments, to be enlarged and varied as the individual case requires, may be, —

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 983–1000; Crim. Proced. II. § 837–850; Stat. Crimes, § 430–449. Incidental, Crim. Law, I. § 298, 429, 568–570, 577, 594, 595, 792; Crim. Proced. I. § 434, 436, note, 486, 540, 541, 570; Stat. Crimes, § 156, note, 223, 246. Compare with Forcible Trespass — Larceny — Trespass to Lands.

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did maliciously [1] [and feloniously [2]], with intent to injure one X,[3] burn and destroy five hundred bushels of corn in the ear, of the property of the said X [4] [of the value of, &c.[5]], [*or*, &c. setting out, in like manner, any other injury, according to the fact, and, if the indictment is on a statute, following herein and covering in all other respects the statutory terms]; against the peace, &c. [ante, § 65–69].[6]

[1] "**Maliciously" and connected Words.** — This word "maliciously," or, at least, its equivalent, is probably necessary in all indictments for the common-law offence. And, plainly enough, under various statutes which do not contain it, interpretation so far supplies it as to render its introduction into the indictment imperative. Consult, among other places, Crim. Proced. I. § 521–525; II. § 842; Stat. Crimes, § 433, 435, 436. Hence the safer course is to insert it in all cases where the pleader does not see distinctly and affirmatively that it is inappropriate and useless. In most of the precedents, various other words of similar meaning are connected with this one. "Wilfully," sometimes employed, adds nothing to it. Ante, § 542, note. Some might choose to connect with it such words as "corruptly, unlawfully, mischievously;" but, if "maliciously" is used, and the mischief is, as it should be, distinctly set out, no just reason appears for requiring more, touching corruption, unlawfulness, and mischief. Of course, where the indictment is on a statute, prudence requires the insertion of all the statutory words, whatever they are.

[2] To be employed where the offence is felony. But generally, with us, it is misdemeanor. There are a few statutory exceptions. Stat. Crimes, § 439.

[3] This clause is not always, and perhaps not in general, necessary. But it is introduced for the purpose of certainly covering the idea, that the malice must be directed specifically against the owner of the property, and general malice will not suffice. Crim. Law, I. § 595; II. § 996, 997; Stat. Crimes, § 432 *a*–437. And see Reg. *v.* Pembliton, Law Rep. 2 C. C. 119, 12 Cox C. C. 607.

[4] The allegation of ownership is, in general, yet not universally under the statutes, indispensable. Crim. Proced. II. § 843; Davis *v.* Commonwealth, 6 Casey, Pa. 421.

[5] Generally unnecessary. But if the value influences as of law the punishment, it must be averred. Stat. Crimes, § 444, 445; post, § 702, note.

[6] For forms and precedents, see 2 Chit. Crim. Law, 23; 3 Ib. 665, 1086–1089, 1098, 1132, 1133; 4 Went. Pl. 54, 78; 6 Ib. 372, 373; 6 Cox C. C. App. 19–23, 68–71; Archb. Crim. Pl. & Ev. 19th ed. 571–573, 575–578, 580–591, 593–596, 598–602; Rex *v.* Hill, 20 Howell St. Tr. 1318; Rex *v.* Codling, 28 Howell St. Tr. 178; Rex *v.* Shepherd, 1 Leach, 4th ed. 539; Rex *v.* Easterby, 2 Leach, 4th ed. 947, Russ. & Ry. 37; Rex *v.* Chapple, Russ. & Ry. 77; Rex *v.* Chalkley, Russ. & Ry. 258; Rex *v.* Tracy, Russ. & Ry. 452; Rex *v.* Whitney, 1 Moody, 3; Reg. *v.* Wallace, 2 Moody, 200, Reg. *v.* Phillips, 2 Moody, 252; Reg. *v.* Whiteman, Dears. 353, 6 Cox C. C. 370; Reg. *v.* Gray, Leigh & C. 365, 9 Cox C. C. 417; Reg. *v.* Child, Law Rep. 1 C. C. 307; Reg. *v.* Pembliton, Law Rep. 2 C. C. 119, 12 Cox C. C. 607; Rex *v.* Richards, 1 Moody & R. 177; Reg. *v.* Howell, 9 Car. & P. 437; Reg. *v.* Kohn, 4 Fost. & F. 68; Reg. *v.* Clegg, 3 Cox C. C. 295; Reg. *v.* Foster, 6 Cox C. C. 25.

Alabama. — Burgess *v.* The State, 44 Ala. 190; Caldwell *v.* The State, 49 Ala. 34; Walker *v.* The State, 49 Ala. 329; Owens *v.* The State, 52 Ala. 400; Bass *v.* The State, 63 Ala. 108; Ashworth *v.* The State, 63 Ala. 120; Brazleton *v.* The State, 66 Ala. 96.

Arkansas. — Lemon *v.* The State, 19 Ark. 171; The State *v.* Hoover, 31 Ark. 676.

California. — People *v.* Cahannes, 20 Cal. 525.

Delaware. — The State *v.* Hamilton, 1 Houst. Crim. 281.

Florida. — McGahagin *v.* The State, 17 Fla. 665.

Georgia. — Castleberry *v.* The State, 62 Ga. 442.

Illinois. — Swartzbaugh *v.* People, 85 Ill. 457.

Indiana. — The State *v.* Merrill, 3

§ 700. **Further of Forms.** — The pleader who lays before him the statutes of his own State, this formula, and such precedents as the reports of his State contain, will encounter few or no practical difficulties. Still what follows in this chapter will be convenient and helpful.

II. *At the Common Law.*

§ 701. **In General.** — English legislation, defining and making heavier this offence, was so early and full that, the indictment

Blackf. 346; The State *v.* Slocum, 8 Blackf. 315; The State *v.* Blackwell, 3 Ind. 529; The State *v.* Pottmeyer, 30 Ind. 287; Stratton *v.* The State, 45 Ind. 468; The State *v.* Sparks, 60 Ind. 298; Lossen *v.* The State, 62 Ind. 437; The State *v.* Walters, 64 Ind. 226; White *v.* The State, 69 Ind. 273; Brown *v.* The State, 76 Ind. 85; Kinsman *v.* The State, 77 Ind. 132.

Iowa. — The State *v.* Brant, 14 Iowa, 180.

Kentucky. — Ellis *v.* Commonwealth, 78 Ky. 130.

Maine. — The State *v.* Harriman, 75 Maine, 562.

Maryland. — Black *v.* The State, 2 Md. 376, 378.

Massachusetts. — Commonwealth *v.* Soule, 2 Met. 21; Commonwealth *v.* Walden, 3 Cush. 558; Commonwealth *v.* Bean, 11 Cush. 414; Commonwealth *v.* Lindsay, 11 Cush. 415, note; Commonwealth *v.* Dougherty, 6 Gray, 349; Commonwealth *v.* Brooks, 9 Gray, 299; Commonwealth *v.* Sowle, 9 Gray, 304; Commonwealth *v.* Cox, 7 Allen, 577; Commonwealth *v.* McLaughlin, 105 Mass. 460; Commonwealth *v.* Falvey, 108 Mass. 304; Commonwealth *v.* Williams, 110 Mass. 401.

Michigan. — McKinney *v.* People, 32 Mich. 284.

Minnesota. — United States *v.* Gideon, 1 Minn. 292, 295.

Missouri. — The State *v.* Hambleton, 22 Misso. 452; The State *v.* Kempf, 11 Misso. Ap. 88.

New Hampshire. — The State *v.* McDuffie, 34 N. H. 523.

New Jersey. — The State *v.* Burroughs, 2 Halst. 426; The State *v.* Beckman, 3 Dutcher, 124; The State *v.* Malloy, 5 Vroom, 410.

New York. — Kilpatrick *v.* People, 5 Denio, 277; People *v.* Carpenger, 5 Parker C. C. 228; People *v.* Moody, 5 Parker C. C. 568.

North Carolina. — The State *v.* Simpson, 2 Hawks, 460; The State *v.* Langford, 3 Hawks, 381; The State *v.* Scott, 2 Dev. & Bat. 35; The State *v.* Jackson, 12 Ire. 329; The State *v.* Staton, 66 N. C. 640; The State *v.* Allen, 69 N. C. 23; The State *v.* Painter, 70 N. C. 70; The State *v.* Simpson, 73 N. C. 269; The State *v.* Tomlinson, 77 N. C. 528; The State *v.* Hill, 79 N. C. 656; The State *v.* Parker, 81 N. C. 548; The State *v.* McMinn, 81 N. C. 585; The State *v.* Roberts, 81 N. C. 605; The State *v.* Bryan, 89 N. C. 531.

Ohio. — Oviatt *v.* The State, 19 Ohio State, 573; Brown *v.* The State, 26 Ohio State, 176.

Pennsylvania. — Davis *v.* Commonwealth, 6 Casey, Pa. 421.

Tennessee. — Taylor *v.* The State, 6 Humph. 285.

Texas. — The State *v.* Broeker, 32 Texas, 611; Benson *v.* The State, 1 Texas Ap. 6; Collier *v.* The State, 4 Texas Ap. 12; Turman *v.* The State, 4 Texas Ap. 586; Brewer *v.* The State, 5 Texas Ap. 248; Jenkins *v.* The State, 7 Texas Ap. 146, 149; Reid *v.* The State, 8 Texas Ap. 430; Achterberg *v.* The State, 8 Texas Ap. 463; Rountree *v.* The State, 10 Texas Ap. 110.

Vermont. — The State *v.* Briggs, 1 Aikens, 226; The State *v.* Jones, 33 Vt. 443; The State *v.* Avery, 44 Vt. 629.

Virginia. — Earhart *v.* Commonwealth, 9 Leigh, 671; Campbell *v.* Commonwealth, 2 Rob. Va. 791; Rateliffe *v.* Commonwealth, 5 Grat. 657.

United States. — United States *v.* Nelson, 5 Saw. 68.

being ordinarily or always upon some statute, no precedents for it under the common law, approved by ancient usage, have come down to us venerable with years. It is believed that the allegations in our formula satisfy all its requirements. But some forms from American cases will be given, not with absolute exactness as they stand in the reports, but with slight omissions of such verbiage as no one claims to be of any legal effect. Thus, —

§ 702. **Killing Cattle to injure Owner — (Short Form).** — It has been adjudged good at the common law simply to aver, —

That A, &c. on, &c. at, &c. did unlawfully, wantonly, maliciously, and mischievously kill one steer [of the value of five dollars [1]] of the goods and chattels of one X; against the peace, &c.[2]

§ 703. **Burning Goods — (Short).** — A like approved form under the common law is, —

That A, &c. on, &c. at, &c. unlawfully, wickedly, maliciously, and mischievously did set fire to, burn, and consume one hundred barrels of tar, of the goods and chattels of one X; against the peace, &c.[3]

§ 704. **More Voluminous.** — In other of our few precedents under the common law the allegations have been more voluminous, though we have no decisions to the point that such expansion is necessary. Thus, —

§ 705. **Maliciously Injuring Cattle.** — It is good, yet how much less will suffice the reader must judge, to say, —

That A, &c. on, &c. at, &c. did maliciously, mischievously, and wickedly put, place, and confine, in a certain enclosed yard of him the said A, two gelding colts and one mare colt,[4] the property of one X, of the value of, &c.;[5] and then and there, upon and about a certain bar-way leading from the said enclosed yard toward and into the enclosed meadow of the said X, maliciously, mischievously, and wickedly placed and fixed a certain sharp pointed instrument called a grass scythe, connected with the snath, so that the edge of the said scythe was inward toward the said enclosed yard of the said A; and the said A then and there, being moved by his most wicked, malicious, and mischievous disposition, maliciously, mischievously, and wickedly, with great force and violence, with intent to maim and destroy the said colts, did drive and compel them over the bars of the said bar-way

[1] **Value.** — This offence being misdemeanor at the common law, the common-law punishment is fine or imprisonment or both, at the discretion of the court. Crim. Law, I. § 940. Therefore the value need not be alleged (ante, § 699, note), unless by statute the punishment has been made in some way to depend upon it in matter of law. Crim. Proced. I. § 77–88, 567; Caldwell *v.* The State, 49 Ala. 34.

[2] The State *v.* Scott, 2 Dev. & Bat. 35.

[3] The State *v.* Simpson, 2 Hawks, 460.

[4] Ante, § 590, 592.

[5] Ante, § 702 and note.

and the said grass scythe, so fixed as aforesaid, whereby and by means of the unlawful, wilful, malicious, and mischievous acts of the said A as aforesaid, the said gelding and mare colts were then and there cut and lacerated, maimed, and destroyed; against the peace, &c.[1]

§ 706. **Harness.** — Another of the elaborately drawn indictments, adjudged good, alleges in one of several counts, —

That A, &c. on, &c. at, &c. unlawfully, wilfully, and maliciously intending to injure one X, and disturb the peace of the people of the State, and from a spirit of wantonness and black and diabolical revenge, which he the said A then and there held against the said X, without just cause, did then and there maliciously and mischievously, and in a secret and clandestine manner, with some sharp instrument to the jurors unknown[2] which he the said A in his right hand then and there held, cut, sever, hack, and otherwise disfigure the reins and tugs and other useful appendages of a certain harness[3] of the value of, &c. the property, goods, and chattels of the said X, the said A then and there well knowing the said X to be the owner thereof; thereby, then and there, with the wicked and malicious intent aforesaid, damaging, injuring, and partly destroying said harness and the tugs and reins and other useful appendages aforesaid belonging to the same, and rendering the same nearly useless; against the peace, &c.[4]

§ 707. **Other Wrong added.** — The following, wherein another element of criminal wrong co-operates with the malicious-mischief element,[5] was adjudged good at the common law, — here slightly varied to render it more certainly adequate: —

That A, &c. and B, &c. on, &c. at, &c. did, at and against the dwelling-house of one X, an aged widow woman who was then in said dwelling-house, wickedly, mischievously, maliciously, and without any legal authority therefor, fire and discharge loaded guns, to the terror and dismay of the said X, and did then and there shoot and kill a dog belonging to said dwelling-house [the said dog being the property of the said X]; against the peace, &c.[6]

[1] The State *v.* Briggs, 1 Aikens, 226.

[2] The words "to the jurors unknown" are not in the count I am here following, but they are in some of the others. If in other particulars this allegation is not needlessly minute, these words would seem to be essential. Ante, § 142, 520, 528.

[3] Ante, § 590, 592.

[4] People *v.* Moody, 5 Parker C. C. 568. One of the other counts has the additional allegation, that the defendant did the mischief "without any hope or expectation of gain or advantage;" and another, apparently intended to bring the case within a statute, that the harness was then and there "the product and work of art, and then and there situate on private ground." Otherwise the further counts consist only of repetitions of what is in the text.

[5] Crim. Proced. II. § 844.

[6] The State *v.* Langford, 3 Hawks, 381. The matter in brackets is added by me, but it was expressly adjudged not to be necessary. Another of my additions is, that X was then in the dwelling-house. The word in the original is "house." I substitute dwelling-house simply because it is more nicely accurate. I do not question the sufficiency of "house."

III. *To Animals under Statutes.*

§ 708. **Aver what.** — The indictment, following our formula [1] and the statute on which it is drawn, describes the animal as directed in "Statutory Crimes," [2] and particularizes the mischief inflicted. Some help may be derived from the chapter on "Cruelty to Animals." [3] Thus, —

§ 709. **Killing — (Old Form).** — On the English "Black Act," [4] creating a felony under the words "unlawfully and maliciously kill, maim, or wound any cattle," an old precedent for the indictment is, with its surplusage, —

That A, &c. [being an ill-designing and disorderly person, and of a wicked and malicious mind [5]], [after the first day of June, in the year of our Lord one thousand seven hundred and twenty-three, to wit [6]], on, &c. [with force and arms [7]], at, &c. one [black [8]] gelding [of the price of fourteen pounds [9]], of the goods and chattels of one X [in a certain field belonging to him the said X then and there being [10]], feloniously, unlawfully, wilfully,[11] and maliciously then and there did kill and destroy; [to the great damage of him the said X [12]], against the peace, &c.[13]

§ 710. **Killing, again.** — The precedent just given has the words "kill and destroy," but "destroy" is needless in allegation where the statute has only "kill." [14] If the statutory words are "wilfully and maliciously kill, maim, or wound any cattle of another," and the offence is misdemeanor, it is plainly adequate in averment, though a form before the writer has some surplusage, here rejected, to say, —

That A, &c. on, &c. at, &c. did unlawfully, wilfully,[15] and maliciously

[1] Ante, § 699.

[2] Stat. Crimes, § 426, 440.

[3] Ante, § 345–361.

[4] Stat. Crimes, § 431.

[5] Unnecessary. Ante, § 46.

[6] Introduced to cover the words in the statute: "If any person or persons, from and after the first day of June, in the year of our Lord one thousand seven hundred and twenty-three," &c. But such matter need never be alleged. Crim. Proced. I. § 622.

[7] Unnecessary. Ante, § 43; Taylor *v.* The State, 6 Humph. 285.

[8] Needless, and better omitted, ante, § 590, 592; Stat. Crimes, § 443.

[9] Better say "value" than price. As to when necessary, see ante, § 699, 702, and notes.

[10] Plainly enough not necessary. And compare with "then and there being found," ante, § 582 and note.

[11] Ante, § 699, note.

[12] Not necessary. Ante, § 48.

[13] 3 Chit. Crim. Law, 1086.

[14] Ante, § 353; Stat. Crimes, § 446.

[15] I should retain this word "wilfully," whether deeming it essential or not, for the reason stated ante, § 542, note.

kill a certain horse of one X [of the value of, &c.[1]]; against the peace, &c.[2]

§ 711. **Another.** — Under the statutory words "wilfully or maliciously kill or destroy, or wound, the beast of another," the indictment for killing may allege, —

That A, &c. on, &c. at, &c. did [wilfully[3]] and maliciously kill a cow, of the value of five dollars, the property of X; against the peace, &c.[4]

§ 712. **Killing under Special Circumstances.** — Under a statute making it a misdemeanor for one to "kill any horse, mule, cattle, hog, sheep, or neat cattle, the property of another, in any enclosure not surrounded by a lawful fence," the averments may be, —

That A, &c. on, &c. at, &c. unlawfully [and wilfully[5]] did kill [injure, and destroy[6]], of the property of X, one cow and one heifer[7] then and there being in an enclosure not surrounded by a lawful and sufficient fence; against the peace, &c.[8]

§ 713. **Killing by Poison, &c.** — There may be ground for the opinion, on a question probably not adjudged, that the word "kill," in this sort of indictment, signifies the outright killing by ordinary means; and that if, for example, the animal's life is taken by poison, the manner of killing should be stated. Thus, the word in the Black Act is "kill,"[9] and it is silent as to

[1] As to alleging the value, see ante, § 699, 702.

[2] The State *v.* Hambleton, 22 Misso. 452. And see the places cited to the next section.

[3] The words of this statute being "wilfully *or* maliciously," there is no such reason for retaining "wilfully" in averment as in the last form. Since it adds nothing in meaning to "maliciously," the neater way is to omit it, though the question is of little consequence.

[4] Taylor *v.* The State, 6 Humph. 285. For other forms, see Rex *v.* King, 6 Went. Pl. 372; Collier *v.* The State, 4 Texas Ap. 12; Commonwealth *v.* Walden, 3 Cush. 558; United States *v.* Gideon, 1 Minn. 292, 295; Swartzbaugh *v.* People, 85 Ill. 457; Commonwealth *v.* Sowle, 9 Gray, 304; The State *v.* Harriman, 75 Maine, 562.

[5] This word "wilfully," not being in the statute, is plainly not required in allegation. I should retain "unlawfully," though it also is not in the statute, and quite likely not strictly necessary. But as the statute would be construed to refer only to the unlawful killing, an indictment with the word "unlawful" is, at least, more artistic than without it. Some would prefer "maliciously," — the technical term in malicious mischief.

[6] In the form before me. These words not being in the statute, there is no propriety in introducing them into the allegation. "Injure," if in the statute, would require expansion in the indictment; "destroy" would not. Stat. Crimes, § 446, 447; post, § 715.

[7] Charging an injury to two animals does not make the indictment double. Stat. Crimes, § 447 *b*.

[8] The State *v.* Painter, 70 N. C. 70. For other like forms, see The State *v.* Simpson, 73 N. C. 269; The State *v.* McDuffie, 34 N. H. 523; The State *v.* Allen, 69 N. C. 23.

[9] Ante, § 709.

"poison;" yet such precedents as we have upon it, in cases of poisoning, specify the poisoning. In the absence of adjudication, it will be the safer course with us to follow this method. Thus, where the offence is felony, as under the Black Act, —

That A, &c. on, &c. at, &c. did feloniously, unlawfully, and maliciously kill, with and by means of poison, three pigs of the swine, cattle, and property of X, of the value of, &c.; against the peace, &c.[1]

§ 714. **Administering Poison.** — Under a statute to punish one "who shall wilfully and maliciously kill, maim, or disfigure any horses, cattle, or other beasts of another person, or shall wilfully and maliciously administer poison to any such beasts," the indictment for the poisoning may charge, —

That A, &c. on, &c. at, &c. did wilfully and maliciously administer to a certain horse, of the value of, &c. of the property of one X [a large quantity, to wit[2]], fifty grains of a certain poison called strychnine; against the peace, &c.[3]

§ 715. **Injuring.** — The word "injure," in a statute, is, in reason, quite unlike the word "kill." Though there are different ways of killing, there is but one result, death. But there are all sorts of results called *injuries*, probably not every one of which is to be interpreted as within the statute; the consequence of

[1] Rex *v.* Chapple, Russ. & Ry. 77. I have omitted the surplusage (ante, § 709, 710), except the allegation of value, which may be surplusage or not. Chitty's precedent sets out the poisoning with greater minuteness. 3 Chit. Crim. Law, 1088. One of his counts, omitting its obvious surplusage, is, —

That A, &c. on, &c. at, &c. one mare, of the value of, &c. of the goods and chattels of one X, feloniously, unlawfully, wilfully, and maliciously did kill and destroy, by having before then, on, &c. there wilfully, maliciously, and unlawfully put and infused into, and mixed with, certain water in a trough there, used for the purpose of watering horses, at which trough the said mare was usually watered, a certain quantity of deadly poison, to wit, white arsenic, of which said water wherein the said poison had been so put, infused, and mixed as aforesaid, the said mare of the said X afterwards, to wit, on the day and year first aforesaid, did there drink, and by reason and in consequence thereof did become at the said time and place of the drinking thereof poisoned, and of said poisoning did afterward, on the same day, there die; against the peace, &c.

[2] In the form before me. Such words are often found in the precedents, particularly the older ones; introduced, one may imagine, to avoid a supposed necessity of proving the exact quantity specified. But, in a case like this, the quantity, in whatever form of words laid, is not of the essence of the allegation, and it need not be proved to have been the same as charged. Crim. Proced. I. § 488 *b*, 488 *c*. Where it is of the essence of the offence, and must be exactly proved, this consequence cannot be averted by the "to wit."

[3] Commonwealth *v.* Brooks, 9 Gray, 299. **"Personal Property."** — Where the statute has the words "personal property," instead of such words as "horse," "cattle," &c. the indictment may be in the same form. And see for a precedent Commonwealth *v.* Falvey, 108 Mass. 304. **Attempt to poison.** — See, for a precedent, Commonwealth *v.* McLaughlin, 105 Mass. 460.

which is, that the word "injure" alone is not adequate in allegation.[1] Many of the statutes also make the extent of the punishment depend on that of the injury, and some of the others render a certain standard of injury essential to the offence itself; requiring, therefore, the same to be, in some proper form, alleged. If, by the statutory terms, it is a misdemeanor for one to "wilfully and maliciously injure any [of certain enumerated] animal or animals, the property of another or others, to the amount of thirty-five dollars or upward," the allegations may be, —

That A, &c. on, &c. at, &c. did wilfully and maliciously injure a certain horse [*or*, mare, &c.], the property of one X, to the amount in value of seventy-five dollars, by then and there cutting from the neck of said horse his entire mane, as close to the skin as the same could be cut and sheared, &c. [proceeding to state, in this way, all the various items of injury; *or*, by then and there injecting into the sides of said mare, near the shoulders, by means of a certain syringe which he the said A then and there had and held, a large quantity of a poisonous substance the name whereof is to the jurors unknown]; against the peace, &c.[2]

§ 716. **Another.** — Under the provision that one "who shall maliciously or mischievously injure, or cause to be injured, any property of another, or any public property, shall be deemed guilty of a malicious trespass, and be fined not exceeding twofold the value of the damage done, to which may be added imprisonment not exceeding twelve months," it is good to aver, —

That A, &c. on, &c. at, &c. did maliciously and mischievously injure a certain dog, the property of one X, doing then and there and thereby damage to the said property to the value of twelve dollars, by then and there maliciously and mischievously shooting and discharging certain dangerous and deadly materials out of a gun which he the said A then and there had and held, at and against the said dog, and killing the said dog; against the peace, &c.[3]

§ 717. **Maiming — Wounding.** — Neither "maim" nor "wound" is quite so precise a word as "kill," but each is reasonably exact

[1] Stat. Crimes, § 447.

[2] Brown *v.* The State, 26 Ohio State, 176; Oviatt *v.* The State, 19 Ohio State, 573. And for other forms see post, § 716 and places referred to in the note.

[3] Kinsman *v.* The State, 77 Ind. 132. For other forms and precedents, see Stat. Crimes, § 447; The State *v.* Merrill, 3 Blackf. 346; The State *v.* Roberts, 81 N. C. 605; The State *v.* Parker, 81 N. C. 548; The State *v.* Hill, 79 N. C. 656; The State *v.* Stanton, 66 N. C. 640; McGahagin *v.* The State, 17 Fla. 665; Caldwell *v.* The State, 49 Ala. 34; Burgess *v.* The State, 44 Ala. 190, 192; Bass *v.* The State, 63 Ala. 108; Ashworth *v.* The State, 63 Ala. 120. Some of these cases proceed on the idea, that the word "injure" is sufficient alone in allegation, and the particulars of the injury need not be stated.

and single in meaning.[1] Therefore the precedents almost uniformly, and beyond doubt correctly, have only the single word "maim," or the word "wound," or the two connected by "and," without specification of particulars.[2] Thus, —

That A, &c. on, &c. at, &c. did [feloniously [3]] wilfully and maliciously [*or*, &c. following the statutory words] maim [*or* wound, *or* maim and wound] a certain horse [*or* ox, *or* cow, *or* ten certain pigs, *or*, &c.] of one X, of the value of, &c. [*or*, otherwise varying the allegations to cover the terms of the statute]; against the peace, &c.[4]

IV. *To other Personal Property under Statutes.*

§ 718. **Injuring.** — It is the same in malicious mischief to ordinary chattels as to animals; "injure," in the statute, must be expanded to the particulars in the indictment.[5] For example, —

That A, &c. on, &c. at, &c. did wilfully and maliciously [following the statutory terms] injure a certain omnibus, the personal property of X [of the value of, &c.[6]], by then and there wilfully and maliciously driving the pole of a horse-railroad car at, against, and through a panel thereof, thereby breaking in pieces the said panel, and otherwise doing damage to the said omnibus; against the peace, &c.[7]

§ 719. **"Damaging."** — The verb "damage," used in some of the English statutes, is so nearly the same in meaning as "injure," as to render it plain that the indictment should be constructed in the same way, simply substituting the one statutory word for the other.[8]

§ 720. **Destroying.** — "Destroy," like "kill," indicates a single, definite result; and the means of destruction, like those of taking

[1] For the signification of "maim," see Stat. Crimes, § 316, 448; of "wound," Ib. § 314.

[2] And see ante, § 352.

[3] To be used only if the offence is felony.

[4] 3 Chit. Crim. Law, 1087, 1087 *a*; Rex *v.* Chalkley, Russ. & Ry. 258; Rex *v.* Shepherd, 1 Leach, 4th ed. 539; Rex *v.* Whitney, 1 Moody, 3; Lemon *v.* The State, 19 Ark. 171; Swartzbaugh *v.* People, 85 Ill. 457; The State *v.* Beekman, 3 Dutcher, 124; The State *v.* Brocker, 32 Texas, 611; Turman *v.* The State, 4 Texas Ap. 586; Reid *v.* The State, 8 Texas Ap. 430; Achterberg *v.* The State, 8 Texas Ap. 463; Ronntree *v.* The State, 10 Texas Ap. 110.

[5] Ante, § 715.

[6] Ante, § 699, 702, and the notes.

[7] Commonwealth *v.* Cox, 7 Allen, 577. And see the form in McKinney *v.* People, 32 Mich. 284; post, § 720, note.

[8] For precedents see Rex *v.* Tracy, Russ. & Ry. 452 (as to which, if the whole form appears in the report, query); Reg. *v.* Clegg, 3 Cox C. C. 295; Reg. *v.* Foster, 6 Cox C. C. 25. **Damaging with Intent to Destroy.** — 6 Cox C. C. App. 21, 22; Reg. *v.* Gray, Leigh & C. 365, 9 Cox C. C. 417.

the life, need not be set out. And it is the same though, in the statute and in the indictment, "injure" is connected with "destroy."[1] Thus, under a statute to punish one who shall "wilfully and maliciously destroy or injure the personal property of another person," &c. though the indictment may use the word "destroy" alone, it may equally well[2] allege, —

That A, &c. on, &c. at, &c. did wilfully and maliciously destroy and injure[3] two lobster cars, &c. [setting out all the articles], the property of one X; against the peace, &c.[4]

§ 721. **Destroying Vessel, &c.** — The offences of destroying a vessel, conspiring to destroy it, and the like, under the legislation of Congress, are considered in another connection.[5] Only seldom is a lawyer called upon to prosecute or defend one for these offences, and then adequate time is given to look up the forms. So that no more is required here than references to places where precedents may be found.[6]

V. *To the Realty under Statutes.*

§ 722. **How in this Sub-title.** — The foregoing expositions of the allegations under such statutory words as "kill," "destroy," "injure," and "damage," will so far serve the pleader under this sub-title as to enable us to proceed in a different order.

[1] Ante, § 708–715; Stat. Crimes, § 446.

[2] Stat. Crimes, § 244.

[3] Still, plainly enough, the word "injure," standing thus without particularization, is mere surplusage; so that, if the proof shows an injury, but not a destroying, there cannot be a conviction. On this idea we have, in McKinney *v.* People, 32 Mich. 284, the following, which is good both for the injuring and for the destroying: —

That A, &c. on, &c. at, &c. a certain harness of the value of, &c. of the personal property of X [then and there being found, *needless*, ante, § 582 and note], feloniously, wilfully, and maliciously did injure and destroy, by then and there cutting the lines and martingales of said harness, and taking the rings from said martingales; against the peace, &c.

[4] Commonwealth *v.* Soule, 2 Met. 21; Commonwealth *v.* Dougherty, 6 Gray, 349. For destroying a steam-engine, 6 Cox C. C. App. 21. Destroying threshing-machine, 6 Cox C. C. App. 22. A note given for rent, 4 Went. Pl. 79. Things for art museum, 6 Cox C. C. App. 70. Cutting cotton warp on looms, The State *v.* Hamilton, 1 Houst. Crim. 281. Burning stack of hay, Black *v.* The State, 2 Md. 376, 378. Forcibly entering dwelling-house with intent to cut serge from looms, 3 Chit. Crim. Law, 1132.

[5] Crim. Law, I. § 570, note.

[6] Destroying and casting away to defraud underwriters, &c. 3 Chit. Crim. Law, 1098; Rex *v.* Easterby, 2 Leach, 4th ed. 947, Russ. & Ry. 37; Rex *v.* Codling, 28 Howell St. Tr. 178; Reg. *v.* Wallace, 2 Moody, 200, Car. & M. 200. Conspiracy to do the same, Reg. *v.* Kohn, 4 Fost. & F. 68. Wilfully burning and destroying a ship having merchandise on board, 3 Chit. Crim. Law, 1098. Plundering a wreck, Rex *v.* Harry, 4 Went. Pl. 54; Rex *v.* Francis, 6 Went. Pl. 373.

§ 723. **Fences.** — For the protection of fences, statutes have made various sorts of mischief to them punishable. Under the words "break, pull down, or injure the fence or fences of another, without the consent of the owner, or person in possession thereof," it is not quite artistic but it is practically good to aver, —

That A, &c. on, &c. at, &c. did unlawfully break, pull, cut down, and injure a certain fence, then and there the property of X, in possession of Y, without the consent of her the said X; against the peace, &c.[1]

§ 724. **Landmark — (Bounds).** — Under a statute to punish one who "shall mischievously remove any monument erected for the purpose of designating the corner or any other point in the boundary of any tract of land, or," &c. the allegations may be, —

That A, &c. on, &c. at, &c. did maliciously and mischievously remove away from its true and accustomed place a certain stone monument there, and theretofore erected on and for the purpose of designating the southwest corner of a certain tract of land, of the property of X, there lying and being [to wit, the south half of the southeast quarter of section twenty-nine, in township seventeen of range ten east, in Henry County, Indiana[2]]; against the peace, &c.[3]

§ 725. **Timber and Trees — (Allegation of Place).** — In a case before a single judge, an indictment alleging that, at a town in a county specified, A cut and carried away hoop-poles "standing and growing upon certain lands of X there situate," was quashed

[1] Brewer *v.* The State, 5 Texas Ap. 248. If, in a case of this sort, the court should, as not unreasonably it might, so interpret the statute as to render the consent of Y, equally with that of X, available in defence, this form would be ill for not negativing Y's consent. On such an interpretation, the negation might be, "without the consent either of the said X or of the said Y." And, in a State where the question has not been adjudged, this will be the safer method. For another form, see Jenkins *v.* The State, 7 Texas Ap. 146, 149. A form held good in The State *v.* Hoover, 31 Ark. 676, is, —

That A, &c. on, &c. at, &c. did wilfully and unlawfully pull down the fence of certain enclosed grounds belonging to one X, without the consent of the said X; against the peace, &c.

Other cases containing similar precedents are Campbell *v.* Commonwealth, 2 Rob. Va. 791; Ratcliffe *v.* Commonwealth, 5 Grat. 657; The State *v.* McMinn, 81 N. C. 585; Brazleton *v.* The State, 66 Ala. 96.

[2] This matter in brackets is copied in exact words from the form before me. The analogies from forcible entry (ante, § 442 and note), larceny from the realty (ante, § 596–600), and various other offences, indicate that it is not necessary, unless there is to be a proceeding for the restoration of the landmark. And see post, § 725.

[3] Stratton *v.* The State, 45 Ind. 468. For removing a corner-stone from the boundary line, The State *v.* Burroughs, 2 Halst. 426. Cutting down and removing a tree marked as a bound, The State *v.* Malloy, 5 Vroom, 410.

as not setting out the place with sufficient precision. The judge observed, that X may have owned "several pieces of land in the town," and the allegation should have been so definite as to enable him to know what piece was meant, and so "come to the trial prepared" to make any appropriate defence as to it.[1] This decision, if it were followed, would overturn a great part of what is established, both in criminal and civil pleading. As indicated in a note to the last section, the indictment for a forcible entry need only describe the place as "a certain messuage and lands then and there [that is, in the county] in the peaceable and quiet possession of one X;"[2] and, what is exactly to the point, an indictment for the larceny of things growing upon land is good if it simply states the place to be "land of one X there," namely, in the county of the indictment.[3] So, in the civil suit for cutting trees on the plaintiff's land, it is an approved form to say, "then growing and being in and upon certain lands there [that is, at the place of the venue] situate."[4] And there is not, in all the law, a single analogy in harmony with the case now in contemplation. Therefore let us reject this case, and frame our allegations, in disregard of it, upon the established precedents and undoubted analogies. Thus, —

§ 726. **Form of Allegation.** — Under the statutory words, "Every person who shall cut, box, bore, or otherwise injure any tree or sapling, on the land of any other person or persons, or, &c. without a license so to do from the owner or owners thereof, or, &c. shall be fined in treble the value of such tree or sapling," it will be a good form to say, —

That A, &c. on, &c. at, &c. did, on and from the land of one X there, cut down and take away a certain tree of the value of, &c. without any license therefor from the said X; against the peace, &c.[5]

[1] People *v.* Carpenger, 5 Parker C. C. 228.

[2] Ante, § 442.

[3] Ante, § 598, 599.

[4] 2 Chit. Pl. 868.

[5] In drawing this form, I had before me the precedent in The State *v.* Blackwell, 3 Ind. 529, but the departures from its language are considerable. For other forms, see People *v.* Carpenger, 5 Parker C. C. 228 (the case criticised in the last section); White *v.* The State, 69 Ind. 273; Reg. *v.* Whiteman, Dears. 353, 6 Cox C. C. 370; 6 Cox C. C. App. 20. For cutting timber on public lands, United States *v.* Nelson, 5 Saw. 68. Setting fire to woods, Earhart *v.* Commonwealth, 9 Leigh, 671. Under the provision of the Black Act (Stat. Crimes, § 431) which makes it felony for one to "cut down or otherwise destroy any trees planted in any avenue or growing in any garden, orchard, or plantation, for ornament, shelter, or profit," Chitty, in 3 Chit. Crim. Law, 1132, has the following precedent: —

That A, &c. on, &c. at, &c. unlawfully,

§ 727. **Injuring a Building.** — A statute making it punishable to "maliciously injure, deface, or destroy any building, or fixture attached thereto," is adequately covered by, —

That A, &c. on, &c. at, &c. did wilfully and maliciously injure and deface a certain church building commonly called a church, of the value of, &c. [the property of X, Y, and Z, as elders of the church of God [1]], by breaking in the windows of said church building, and splitting and breaking the doors of the same; against the peace, &c.[2]

§ 728. **Saw-mill.** — Where a statute makes punishable one who "shall wilfully and maliciously break down, injure, or remove any dam, reservoir, gate, flume, or any of the wheels, mill gear, or machinery of any water-mill or steamboat," the indictment may aver, —

That A, &c. on, &c. at, &c. did wilfully and maliciously remove and carry away one saw-mill saw, of the value of, &c. the property of one X, which saw was then and there a part of the machinery of a certain water saw-mill, the property of the said X, there situate; against the peace, &c.[3]

§ 729. **Destroying Aqueduct Pipe.** — Under the words "cut, injure, or destroy any leaden or other pipe used as an aqueduct, for the conveyance of water," the indictment may charge, —

That A, &c. on, &c. at, &c. wilfully and maliciously did cut, injure, and destroy a certain leaden pipe, used as an aqueduct for the conveyance of water, the property of one X [then and there being found [4]]; against the peace, &c.[5]

maliciously, and feloniously did cut down and destroy two [elm, *needless*, and better omitted, ante, § 590, 592] trees in a certain avenue to the dwelling-house of one X, there planted and then growing for ornament there, he the said X then being the owner of the said trees [to the great damage, &c. *needless*, ante, § 48]; against the peace, &c. [omitting the force and arms allegation, *needless*, ante, § 43.]

[1] No allegation of ownership is required in a case of this sort. Ante, § 183 and note; Crim. Proced. II. § 36, 777.

[2] The State *v.* Brant, 14 Iowa, 180. Another form under a similar statute may be, —

That A, &c. on, &c. at, &c. did unlawfully, maliciously, and mischievously injure a certain house there, the property of one X, by then and there unlawfully, maliciously, and mischievously tearing off the roof of said house, to the damage of the said X in the sum of, &c.; against the peace, &c. The State *v.* Sparks, 60 Ind. 298.

For another form for injuring a building, Commonwealth *v.* Williams, 110 Mass. 401. Breaking glass and destroying windows, Commonwealth *v.* Bean, 11 Cush. 414; Kilpatriek *v.* People, 5 Denio, 277; 6 Cox C. C. App. 71. Defacing jail, The State *v.* Bryan, 89 N. C. 531. Demolishing house, Reg. *v.* Phillips, 2 Moody, 252; Rex *v.* Richards, 1 Moody & R. 177; Reg. *v.* Howell, 9 Car. & P. 437.

[3] The State *v.* Avery, 44 Vt. 629.

[4] In the form before me, but evidently not necessary. Ante, § 582 and note.

[5] The State *v.* Jones, 33 Vt. 443.

§ 730. **Other Forms** — may readily be drawn in analogy to the foregoing. It would afford the pleader little help to continue these illustrations; but some references to places where other forms may be found will be convenient.[1]

VI. *Practical Suggestions.*

§ 731. **Analogies.** — The analogies of this offence to various others, for which the forms of the indictment are well established, will be suggestive to the pleader. In like manner, both parties may from such analogies derive help as to the evidence. They need not be here particularized, for they are obvious.

§ 732. **The Statutes** — are very numerous and somewhat diverse in their terms. This fact should lead to caution in the use of precedents and in relying on points adjudged. The practitioner, on either side, ought carefully to examine the statutes of his own State; and, unless he does, and construes them as the courts will, he will be likely to lose causes which he ought to win.

[1] **Injuring Toll-gate,** — The State *v.* Walters, 64 Ind. 226; 6 Cox C. C. App. 70. **Destroying Bridge,** — Owens *v.* The State, 52 Ala. 400. **Drowning or injuring Mine,** — 6 Cox C. C. App. 20, 21. **Mill-Pond,** — 6 Cox C. C. App. 70. **Public Statue,** — 6 Cox C. C. App. 71. **Fish-pond,** — 3 Chit. Crim. Law, 1132. **Banks of Canal,** — 6 Cox C. C. App. 22. **Ditch,** — Castleberry *v.* The State, 62 Ga. 442. **Obstructing Mill-race,** — The State *v.* Tomlinson, 77 N. C. 528. **Cutting and carrying off Ice,** — The State *v.* Pottmeyer, 30 Ind. 287.

For MALICIOUS CUTTING, STABBING, WOUNDING, see ante, § 696.
MALICIOUS TRESPASS, see TRESPASS TO LANDS.
MALICIOUS SHOOTING, see ante, § 695.
MALPRACTICE, see ante, § 213, 527–530 — ABORTION — MALFEASANCE AND NON-FEASANCE IN OFFICE — NEGLECTS.
MANSLAUGHTER, see HOMICIDE.
MARINER, see ante, § 580.

CHAPTER LVII.

MARRIAGE, OFFENCES AGAINST.[1]

§ 733. **Elsewhere.** — Most of the offences against marriage are treated of under other titles; as, "Abduction," "Conspiracy," "Incest," "Polygamy," "Seduction." A few remain for this place.

Refusing to Solemnize. — Whether it is indictable for a clergyman or magistrate, authorized to marry people, to refuse a couple properly applying, is a question somewhat considered in another place.[2] Should the reader have occasion to draw an indictment for such refusal, he may consult the English one in the case referred to in the note.[3] It must state the facts out of which arose the duty, aver disobedience; and, if on a statute, cover the statutory terms. So that only by accident would a form good in one State be so in another, and none need be attempted here.

§ 734. **Solemnizing Marriage of Persons under Impediment.** — A statute makes punishable one who "shall undertake to join others in marriage, knowing . . . of any legal impediment to the proposed marriage." On this the averments may be, for example, —

That A, &c. [ante, § 74–77] on, &c. at, &c. [ante, § 80] being a justice of the peace of said township in and for said county, unlawfully did then and there undertake to join in marriage X [ante, § 79] and Y [ante, § 79], by then and there performing a ceremony as of a marriage between them,[4] she the said Y then and there being, and the said A then and there

[1] For the direct expositions of such of these offences as are not treated of under separate titles, see Stat. Crimes, § 737–739; 1 Bishop Mar. & Div. § 341–347 *a*. Incidental, Crim. Law, I. § 373, 509, 555; II. § 218, 235, 422, 445; Crim. Proced. II. § 244; Stat. Crimes, § 149, 222, 237, 587, 604 *a*, 666. And see ADULTERY — CONSPIRACY — INCEST — POLYGAMY — SEDUCTION AND ABDUCTION.

[2] 1 Bishop Mar. & Div. § 347.

[3] Reg. *v.* James, 2 Den. C. C. 1, 3 Car. & K. 167, 14 Jur. 940.

[4] This clause, "by then and there," &c.

well knowing her to be, a female under the age of sixteen years, to wit, of the age of thirteen years and no more [and not capable in law of contracting marriage [1]]; against the peace, &c. [ante, § 65–69].[2]

§ 735. **Solemnizing without Consent of Parents.** — On a statute given in another work,[3] and in terms which the reader will infer, the allegations for solemnizing the marriage of a minor without the consent of parents may be, —

That A, &c. on, &c. at, &c. being a regularly ordained minister of the Christian denomination called, &c. and authorized by law then and there to solemnize marriage, did then and there unlawfully solemnize a marriage between one X and one Y, while the said Y was a female over the age of fourteen years and under the age of eighteen years [under the guardianship of one Z who was then living in this State; *or*, having a father then living in this State, to wit, one U, and having no guardian, and her mother being dead; *or*, &c. bringing the case within the statute by stating it according to any other form of the facts;[4] *or*] having parents living in this State, without their consent in person or in writing [*or*, if the pleader adopts the matter in the other brackets, without the consent in person or in writing of the said Z, *or* the said U, *or*, &c. as the other allegations and the facts require]; against the peace, &c.[5]

§ 736. **Solemnizing without Banns or License.**[6] — Under a provision making punishable "any person" (the reader will distinguish this expression from "any minister," &c. "any justice of the peace," &c.) who "shall solemnize matrimony without pub-

is not in the form before me, which, without any special consideration of it, was treated as good. I should deem its introduction prudent, not meaning to express an opinion on the sufficiency of the allegations in its absence.

[1] This matter in brackets is in the form before me, and some pleaders will choose to insert it, as giving a sort of finish to the allegations. But, as it simply declares the law, it is not legally necessary. Ante, § 407 and note, 494, 496, 564 and note.

[2] Bonker *v.* People, 37 Mich. 4.

[3] 1 Bishop Mar. & Div. § 342. And see Ib. § 343, 344.

[4] The matter in these brackets is not in this extended way in the precedent before me. But, though the form without it might pass with a particular tribunal, there is ground for the opinion that, by the strict rules of criminal pleading, it ought to be inserted. The statutory words here are, "without the consent in person or in writing of the parent or guardian of such male or female minor, if they have either parent or guardian living in this State." Now, the person injured by this wrong is, not the minor, but the parent or guardian; and the general rule for indictments is, that the name of the injured person must, if known, be alleged. Crim. Proced. I. § 571. So, likewise, every negative averment must be carefully made broad enough to exclude every possible exception. Ante, § 642, note, and places there referred to. Within which rule it would not suffice simply to negative the parent's consent; that of the guardian, or the fact of there being no guardian, should be added.

[5] The State *v.* Willis, 4 Eng. 196; Sikes *v.* The State, 30 Ark. 496, 497; The State *v.* Ross, 26 Misso. 260; The State *v.* Winright, 12 Misso. 410; United States *v.* McCormick, 1 Cranch C. C. 106, 593.

[6] 1 Bishop Mar. & Div. § 345.

lication of banns, unless license of marriage be first had and obtained from," &c.[1] it is good to allege, —

That A, &c. [*add*, under a statute differently worded, "being a regularly ordained minister," &c. as in the last section, *or* being a justice of the peace, &c. following the statutory terms [2]], on, &c. at, &c. did unlawfully [and feloniously [3]] solemnize matrimony between X and Y [ante, § 78, 79] without publication of banns of marriage in that behalf made, and without any license of marriage in that behalf first had and obtained from any person or persons having authority to grant the same; [in contempt, &c. to the evil example, &c.[4] and] against the peace, &c.[5]

§ 737. **Solemnizing, being Unauthorized Person.** — Forms referred to in the note.[6]

§ 738. **Other Offences.** — Forms referred to in the note.[7]

§ 739. **Miscegenation.**[8] — One form of the inhibition declares punishable "any white person" who "shall, within this State, knowingly marry a negro, or a person of mixed blood descended from negro ancestry to the third generation inclusive, though one ancestor of each generation may have been a white person; or, having so married in or out of the State, shall continue within this State to cohabit with such negro or such descendant of a negro." And the averments may be, —

That A, &c. on, &c. at, &c. being a white man, did then and there unlawfully [and feloniously [9]] knowingly marry one X, who was then and there [and the said A then and there knowing her to be [10]] a negro woman

[1] The English repealed statute of 26 Geo. 2, c. 33, § 8.

[2] United States *v.* McCormick, 1 Cranch C. C. 106, 593.

[3] To be employed where the offence is felony.

[4] Though in the form before me, not necessary. Ante, § 45, 48; Crim. Proced. I. § 647.

[5] 3 Chit. Crim. Law, 711; Rex *v.* Wilkinson, 6 Went. Pl. 374; The State *v.* Loftin, 2 Dev. & Bat. 31.

[6] Rex *v.* Stonage, Jebb, 121; Rex *v.* Sandys, Jebb, 166. And see post, § 848.

[7] Deceits to procure false entries in register, 3 Chit. Crim. Law, 712; Reg. *v.* Brown, 1 Den. C. C. 291, 3 Cox C. C. 127, 2 Car. & K. 504. False oath to procure marriage license, Reg. *v.* Fairlie, 9 Cox C. C. 209. Conspiracy, by deceitful and indirect practices, to procure the marriage of a wealthy minor to a disreputable poor person, Rex *v.* T. T., Trem. P. C. 99. Procuring marriage with minor by falsehood, 3 Chit. Crim. Law, 713.

[8] Stat. Crimes, § 738; 1 Bishop Mar. & Div. § 308–308 *c*.

[9] To be used in States where the offence is felony.

[10] Not in the form before me; yet, under the strict rules of criminal pleading, it would seem to be necessary. The reason is, that the indictment must cover, not merely the verbal, but the interpreted, statute. Ante, § 32. And, beyond doubt, any court would interpret this statute to mean, that the party proceeded against knew the other to be a negro, not merely knew himself to be going through the ceremony of marriage. But, with this matter in brackets omitted from the allegations, it is, at least, questionable whether the indictment can be understood to mean so much; for the rules of interpretation are not quite the

[*or*, did then and there, having theretofore, on, &c. at N, in the State of M, intermarried with one X, a negro woman, and having removed with said X to this State, knowingly, and knowing the said X to be a negro woman, continue to cohabit with her in this State]; against the peace, &c.[1]

§ 740. **Following Statutes.** — The classes of offences included within this chapter are of sorts varying a good deal in the several States; therefore the pleader should consider carefully the statutes of his own State relating thereto, and their interpretation, and cover the several interpreted terms.

same for the two things, nor are the words of the statute and the allegations thereon absolutely identical. The cautious pleader, therefore, will insert this matter.

[1] Frasher *v.* The State, 3 Texas Ap. 263, 264; Moore *v.* The State, 7 Texas Ap. 608. A briefer form satisfies the statutory requirements in Alabama; as, see Green *v.* The State, 58 Ala. 190. I have no form to guide me in an attempt to cover the clause of the statute as to marrying a "person of mixed blood," &c. except a *dictum* from the judge in one of the cases. Frasher *v.* The State, 3 Texas Ap. 263, 279. It is believed that the words "though one ancestor of each generation may have been a white person" are of a sort not requiring to be noticed in the averments (ante, § 674 and note and places there referred to), and so they may be, —

Marry X, &c. [as above] a woman of mixed negro and white blood, descended from a negro within the third generation inclusive from the negro [*adding*, if the pleader doubts the sufficiency of this], it being to the jurors unknown in which or how many or all of the said three generations one of the ancestors of the said X was a white person.

CHAPTER LVIII.

MAYHEM AND STATUTORY MAIMS.[1]

§ 741. **At Common Law.** — For reasons stated in another connection,[2] it would not be possible to present a form of the indictment for mayhem under the common law, as it stood in England before there were statutes of mayhem, of any practical benefit whatever. Nor upon any of the early English statutes will the pleader be likely ever to found an indictment,[3] while yet the precedents under the Coventry Act will be suggestive of the forms of allegation proper under enactments similarly expressed in his own State.

§ 742. **Formula for Indictment on Statute.** — The pleader should cover, after the ordinary rules,[4] the terms of his statute, introducing the word "feloniously" if the offence is felony, not if it is misdemeanor, in a statement of the particular facts. Thus, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did [feloniously and] of his malice aforethought [if such are the statutory words, but, whatever they are, they should be employed in the allegation] make an assault[5] upon one X [ante, § 78, 79], and then and there feloniously and of his malice aforethought [*or*, &c. as above] did, &c. [setting out his acts in

[1] For the direct elucidations of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 1001–1008; Crim. Proced. II. § 850 *a*–859. Incidental, Crim. Law, I. § 257, 259, 513, 861, note, 865, 867, 935; Crim. Proced. I. § 629, note; II. § 90; Stat. Crimes, § 185, 316, 317. See the title MALICIOUS INJURIES TO THE PERSON.

[2] Crim. Proced. II. § 851.

[3] Crim. Law, II. § 1002, 1003.

[4] Crim. Proced. I. § 593–642.

[5] The statutes are generally silent as to an assault; but the averment of it, being descriptive of the manner of the maiming, does not render the indictment double. And practically this averment should, in general, or always, be introduced; because then, if the proofs of the heavier offence fail, there may be a conviction for the lighter, unless there is a technical rule (Crim. Law, I. § 794–798, 804–815) to prevent. Crim. Proced. II. § 859. It may be best to aver, in addition to the assault, a battery; as, in Haslip *v.* The State, 4 Hayw. 273. And see Crim. Proced. II. § 859. The right to do it rests on the same reason. Of course, on the ordinary terms of these statutes, the pleader can, if he chooses, omit the allegations both of the assault and of the battery. Commonwealth *v.* Woodson, 9 Leigh, 669.

the interpreted [1] terms of the remaining part of the statute]; against the peace, &c. [ante, § 65–69].[2]

§ 743. **On Coventry Act — (Slitting Nose).** — The Coventry Act has now given place, in England, to provisions differently expressed; but there are, in some of our States, statutes in nearly the same words. It is recited in "Criminal Law." [3] A standard form for the indictment on it, mingling the needful and the needless, is, —

That A, &c. on, &c. [contriving and intending one X, then and yet being a subject of our Lord the King, to maim and disfigure [4]], at, &c. [with force and arms [5]], in and upon the said X [in the peace of God and our said Lord the King then and there being [6]], on purpose, and of his malice aforethought, and by lying in wait, unlawfully and feloniously did make an assault; [7] and the said A, with a certain iron bill [of the value of one penny [8]] which he the said A in his right hand then and there had and held, [9] the nose of the said X, on purpose, and of his malice aforethought, and by lying in wait, then and there unlawfully and feloniously did slit, with intention the said X, in so doing in manner aforesaid, to maim and disfigure [the entire statute, as respects the slitting of the nose, is now covered. If there were abettors, at or before the fact, proceed as directed ante, § 113–117, 539. Or, regarding the terms in the latter part of this statute, proceed]: and that B, &c. at the time when the aforesaid felony by

[1] Ante, § 32.

[2] For forms and precedents, see 3 Chit. Crim. Law, 787; Rex *v.* Ringrose, Trem. P. C. 33; Rex *v.* Woodburne, 16 Howell St. Tr. 53; Rex *v.* Carroll, 1 Leach, 4th ed. 55; Rex *v.* Briggs, 1 Moody, 318, 1 Lewin, 61.

Alabama. — The State *v.* Absence, 4 Port. 397; The State *v.* Briley, 8 Port. 472.

Massachusetts. — Commonwealth *v.* McGrath, 115 Mass. 150; Commonwealth *v.* Blaney, 133 Mass. 571.

Missouri. — The State *v.* Thompson, 30 Misso. 470.

New York. — Burke *v.* People, 4 Hun, 481; Godfrey *v.* People, 5 Hun, 369, 63 N. Y. 207; Tully *v.* People, 67 N. Y. 15.

North Carolina. — The State *v.* Ormond, 1 Dev. & Bat. 119.

Oregon. — The State *v.* Vowels, 4 Oregon, 324.

Pennsylvania. — Respublica *v.* Langcake, 1 Yeates, 415; Respublica *v.* Reiker, 3 Yeates, 282.

Tennessee. — Haslip *v.* The State, 4 Hayw. 273; Chick *v.* The State, 7 Humph. 161; Worley *v.* The State, 11 Humph. 172.

Virginia. — Commonwealth *v.* Somerville, 1 Va. Cas. 164; Commonwealth *v.* Woodson, 9 Leigh, 669.

West Virginia. — The State *v.* Stewart, 7 W. Va. 731.

Wisconsin. — Moore *v.* The State, 3 Pin. 373; The State *v.* Blœdow, 45 Wis. 279.

[3] Crim. Law, II. § 1003.

[4] There is no reason for supposing any part of this matter in brackets to be essential. The statute defines the intent, which alone is required, and it is averred further on.

[5] Needless. Ante, § 43.

[6] Needless. Ante, § 47.

[7] As to the averment of assault, see ante, § 742, note.

[8] Not necessary. Crim. Proced. II. § 505.

[9] Evidently the manner of holding the weapon need not be averred. Ante, § 520, note; Crim. Proced. II. § 856.

the said A in manner and form aforesaid was done and committed, to wit, on the said, &c. at, &c. [with force and arms [1]], on purpose, and of his malice aforethought, and by lying in wait, unlawfully and feloniously was present, knowing of and privy to the said felony, aiding and abetting the said A in the felony aforesaid, in manner and form aforesaid done and committed. [And so the jurors, &c. do say, that the said A and B, on the said, &c. at, &c. aforesaid, with force and arms, on purpose, and of their malice aforethought, and by lying in wait, the felony aforesaid, in form aforesaid, unlawfully and feloniously did do and commit, and each of them did do and commit [2]]; against the peace, &c.[3]

§ 744. **On Similar Statute.** — By a statute in New York, one is liable to imprisonment "who, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intention to kill or commit any felony, shall, 1. Cut out or disable the tongue; or, 2. Put out an eye; or, 3. Slit the lip, or slit or destroy the nose; or, 4. Cut off or disable any limb or member of another, on purpose." [4] This provision, though similar to the Coventry Act, differs from it so far as to require a separate consideration. The words "evinced by lying in wait for the purpose, or in any other manner," are of a sort not required to be covered by the allegations.[5] It is good to say, —

That A, &c. on, &c. at, &c. feloniously and from premeditated design and on purpose made an assault upon one X, and the thumb [*or*, the ear, *or*, &c.] of the said X did then and there feloniously and from premeditated design, with the teeth of him the said A [*or*, with a certain knife which he the said A then and there had and held, *or*, &c. naming in like manner any other instrument], on purpose, lacerate and disable [*or*, cut off, *or*, &c. specifying what, and adhering to the statutory terms]; against the peace, &c.[6]

§ 745. **Simpler — (Other Forms).** — Some of the statutes are in terms somewhat simpler than these, admitting of allegations less complicated. On them the pleader will require no other help

[1] Unnecessary. Ante, § 43.

[2] The matter in these brackets seems to have been copied from the forms in murder, without the same or any other reason for it. There can be no doubt that it is unnecessary. Crim. Proced. II. § 548–550, 856.

[3] 3 Chit. Crim. Law, 787. For a precedent in similar terms, see Rex *v.* Carroll, 1 Leach, 4th ed. 55. **Eye.** — The like, under the same statute, for cutting and disabling the eye, Rex *v.* Ringrose, Trem. P. C. 33.

[4] 2 R. S. 664, marg. p. § 27, 2 Edm. Stat. 683.

[5] Ante, § 674 and note, and places there referred to.

[6] Tully *v.* People, 67 N. Y. 15; Godfrey *v.* People, 5 Hun, 369, 63 N. Y. 207. The precedents in these cases were before me while drawing this form. The explanations of various omissions appear in the foregoing notes in this chapter.

than is furnished by the foregoing sections and the chapter in "Criminal Procedure."[1]

§ 746. **Attempts.** — For attempts at mayhem the allegations may follow the directions given already.[2] As, —

§ 747. **Wounding with Intent.** — Under a statute making punishable one who "shall unlawfully and maliciously stab, cut, or wound any person, with intent . . . to maim . . . such person,"[3] there need be no averment in terms of assault and battery, though in prudence the pleader may choose to insert it,[4] nor need the means by which the wound was inflicted be set out;[5] but it will be adequate to aver, —

That A, &c. on, &c. at, &c. did [feloniously] unlawfully and maliciously stab, cut, and wound one X, upon the head of him the said X, with intent then and there to maim him; against the peace, &c.[6]

§ 748. **Assault with Intent.** — The allegations may be, —

That A, &c. on, &c. at, &c. did [feloniously] and maliciously [*or*, &c. following the statute] make an assault on one X [add here with what weapon, if by the statute the weapon is an element in the offence] and him, &c. [alleging a battery if required to cover the statute], with the intent then and there, by, &c. [say what],[7] to maim and disfigure him the said X; against the peace, &c.[8]

[1] For some particular forms, see — disabling the arm, The State *v.* Briley, 8 Port. 472. Biting off nose, Commonwealth *v.* Blaney, 133 Mass. 571. Biting off ear, The State *v.* Absence, 4 Port. 397; The State *v.* Ormond, 1 Dev. & Bat. 119. Putting out eye, Respublica *v.* Reiker, 3 Yeates, 282; Chick *v.* The State, 7 Humph. 161. Castration, Worley *v.* The State, 11 Humph. 172.

[2] Ante, § 100–112. And see Crim. Proced. II. § 90.

[3] 9 Geo. 4, c. 31, § 12.

[4] Ante, § 742 and note.

[5] Rex *v.* Briggs, 1 Moody, 318, 1 Lewin, 61.

[6] Rex *v.* Briggs, supra.

[7] Doubtless not required in all cases.

[8] Commonwealth *v.* McGrath, 115 Mass. 150; The State *v.* Stewart, 7 W. Va. 731; Moore *v.* The State, 3 Pin. 373; Haslip *v.* The State, 4 Hayw. 273; The State *v.* Thompson, 30 Misso. 470.

For MEAT, UNWHOLESOME, see NOXIOUS AND ADULTERATED FOOD.
MEDICAL MALPRACTICE, see HOMICIDE — NEGLECTS.
MILK, see NOXIOUS AND ADULTERATED FOOD.
MILLER, see TOLLS.
MISCEGENATION, see ante, § 739.
MISCHIEF, see MALICIOUS MISCHIEF.
MISCONDUCT IN OFFICE, see MALFEASANCE AND NON-FEASANCE.
MISPRISION, see ante, § 128–130.
MURDER, see HOMICIDE.
MUTINY, see ante, § 580.
NAVIGABLE RIVERS, see WAY.

CHAPTER LIX.

NEGLECTS.[1]

§ 749. **This Title.** — The subject of neglect does not properly constitute a separate title in the criminal law. Nor does it, in any of the preceding volumes of this series, occupy, as here, a place by itself; but it is treated of under the other heads, in its several appropriate places. All indictments for criminal neglect have a certain uniformity of construction; for which reason, and for practical convenience both to the writer and reader, this separate title is here given.

§ 750. **How the Indictment — Formula.** — The indictment must be in terms to show, or render *prima facie* obvious, a legal duty of the defendant and his ability to perform it, the common method being either to aver such duty and ability in words, or to set out facts whence *prima facie* they appear;[2] it must point out the particular neglect of such duty; and, if the neglect is of a sort indictable only after having resulted in certain specific evil consequences, or is more heavily punishable then, it must allege the consequences; and it must contain all identifying matter required by the ordinary rules for indictments. Thus, —

That A, &c. [ante, § 74–77] on, &c. at, &c. [ante, § 80] was the father of one X [ante, § 78, 79], who was then and there a helpless child of the tender age of one year and six months, unable to provide or care for himself, and under the care, protection, and control of the said A his father,

[1] For various expositions of this subject, see Crim. Law, I. § 216–221, 241, 256, 257, 267, 269, 305, 307, 313–321, 324, 419–421, 433, 468 *a*, 513, 717–721, 819, 824, 883, 884, 888, 891 *a*; II. § 16, 29, 33, 464, 579, 580, 620, 643, 656 *b*, 659–662 *a*, 664–669, 685, 686, 696, 840, 879, 978, 1045, 1065, 1100, 1104, 1270, 1281; Crim. Proced. I. § 53, 398, 542, 555, 591, 637, 648, 649; II. § 538, 538 *a*, 558, 822–832, 1043–1049; Stat. Crimes, § 242, 596 *a*, 664, 877, 1022; ante, § 218, 526, 529–531, 684, 685.

[2] In the case, for example, of a neglect to discharge official duties, the allegation that the defendant held the office would be a sufficient *prima facie* showing both of the duty and the ability (Crim. Proced. II. § 822); but, in cases of a different sort, more of allegation is required. And see ante, § 684, note.

the said A having then and there all necessary means and ability therefor[1] [*or*, &c. setting out any other facts to show, or otherwise averring, a legal duty and the ability to perform it]; whereupon the said A did then and there unlawfully [and feloniously, if the offence is felony; *or*, feloniously and of his malice aforethought, if it is murder; *or*, &c. according to the requirements of the particular case] neglect, &c. [*or*, abandon, &c. setting out the special facts in terms appropriate to the class to which they belong]; against the peace, &c. [ante, § 65–69].[2]

§ 751. **Neglecting Dependent Person.** — One of the common neglects is that of a person who, being under the duty and having the means, omits to provide for a dependent person, thereby inflicting on him an injury. A form for the allegations, where death has been the consequence, was given under the title "Homicide."[3] But where the injury is less, the neglect is still an offence at common law, as well as under various statutes. Rejecting from the precedents obvious surplusage, and not copying them quite literally, we have the following form, good at the common law and under any statute the terms whereof it duly covers: —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment [ante, § 83],[4] at, &c. having the means and ability to

[1] Crim. Proced. II. § 538, 538*a*, 558, 822; Reg. *v.* Chandler, Dears. 453, 6 Cox C. C. 519; Reg. *v.* Ryland, Law Rep. 1 C. C. 99, 10 Cox C. C. 569.

[2] For forms and precedents, see ante, § 218, 526, 529–531, 684, 685; Archb Crim. Pl. & Ev., 19th ed., 734, 750; 3 Chit. Crim. Law, 830; 4 Went. Pl. 363; 6 Cox C. C. App. 40; 7 Ib. App. 30, 32; 10 Ib. App. 45; Rex *v.* Fenton, Trem. P. C. 267; Rex *v.* Friend, Russ. & Ry. 20; Reg. *v.* Chandler, supra; Reg. *v.* Porter, Leigh & C. 394, 9 Cox C. C. 449; Reg. *v.* Baker, Law Rep. 2 Q. B. 621; Reg. *v.* Ryland, Law Rep. 1 C. C. 99, 100, 10 Cox C. C. 569; Reg. *v.* White, Law Rep. 1 C C. 311, 12 Cox C. C. 83; Rex *v.* Ridley, 2 Camp. 650; Rex *v.* Smith, 2 Car. & P. 449; Reg. *v.* Dunnett, 1 Car. & K. 425; Reg. *v.* Smison, 1 Cox C. C. 188; Reg. *v.* S., 5 Cox C. C. 279; Reg. *v.* Pardenton, 6 Cox C. C. 247; Reg. *v.* Smith, 14 Cox C. C. 398; Reg. *v.* Nasmith, 42 U. C. Q. B. 242.

Alabama. — Molett *v.* The State, 33 Ala. 408; Cheek *v.* The State, 38 Ala. 227.

Massachusetts. — Commonwealth *v.* Dedham, 16 Mass. 141; Commonwealth *v.* East Boston Ferry, 13 Allen, 589; Commonwealth *v.* Osborn Mills, 130 Mass 33.

Michigan. — People *v.* Dunkel, 39 Mich. 255, 256, note.

Missouri. — The State *v.* Smith, 66 Misso. 92.

New Hampshire. — The State *v.* Gilmore, 4 Fost. N. H. 461; The State *v.* Fitts, 44 N. H. 621.

New York. — Cowley *v.* People, 21 Hun, 415, 417, 83 N. Y. 464.

South Carolina. — The State *v.* Penny, 19 S. C. 218.

[3] Ante, § 530.

[4] **Time.** — The continuing form of the allegation of time is adapted to this class of cases and is common in them. Still, except under a peculiar doctrine prevailing in Massachusetts, the wrong may, in general, be laid with equal effect as committed on a single day, and the proofs may equally well go backward and forward to cover the time before and after. Crim. Proced. I. § 397, 402; Cowley *v.* People, 83 N. Y. 464.

discharge all his hereinafter recited duties, had in his care and dwelling in his house as a servant and part of his household, one X, a girl of the tender age of ten years, and unable to take care of and provide for herself, to whom the said A during all the aforesaid time there stood in the place of father and for whom he was under the duty to provide as for a minor child [1] [*or*, was the father of one X, a girl of the tender age of ten years, unable to take care of herself, or to furnish herself with the necessaries of life, and for whom he as such father was during all said time under the duty to provide; *or*, had in his household one X, an adult male person deficient in understanding and unable to take care of himself, whom the said A had for a good and valuable consideration undertaken to take care of and supply all his wants], and thereupon did there during all said time [ante, § 84] withhold from and neglect and refuse to give and administer to the said X sufficient and wholesome meat, drink, food, and clothing for the due sustenance of the said X and the protection of the said X from the cold [*or*, &c. setting out the neglect according to the special facts], whereby the said X became greatly enfeebled and debilitated in body and impaired in health, and on the day of the finding of this indictment, and for a long time before, was and is, by reason thereof, in a sick and feeble condition of body, and permanently injured in health and physical constitution [*or*, &c. stating the special facts of the case]; against the peace, &c.[2]

§ 752. **Same under Statute.** — Where a statute makes punishable one who, "having the care or custody of any child, shall wilfully cause or permit the life of such child to be endangered, or the health of such child to be injured, or who shall wilfully cause or permit such child to be placed in such a situation that its life may be endangered, or its health shall be likely to be injured," the indictment may charge, for example, —

That A, &c. on, &c. [adding the continuando, as in the last section, or not, at the election of the pleader], at, &c. having the care and custody of one X, who was then and there a child of the tender age of five years,[3]

[1] In this case and various others, there would perhaps be no need of specially alleging ability, the undertaking implying it, and if the party becomes disabled he should relinquish his trust. Cowley *v.* People, supra; where, among other things, Folger, C. J. observed: "There is a difference between a natural duty, or a duty imposed by operation of law, and a duty assumed voluntarily and that may be put off voluntarily." p. 473.

[2] If the neglect was by a wife, who is made the defendant, while the legal duty was on the husband, the allegations should be shaped to cover the special case; as, that the husband delegated the duty to her, and supplied the means, and she undertook to perform it, or otherwise as the inculpating fact was. For forms and precedents, see 3 Chit. Crim. Law, 830; 6 Cox C. C. App. 40; 7 Ib. App. 30, 32; Rex *v.* Ridley, 2 Camp. 650; Rex *v.* Smith, 2 Car. & P. 449; Reg. *v.* Chandler, Dears. 453, 6 Cox C. C. 519; Rex *v.* Friend, Russ. & Ry. 20; Reg. *v.* Ryland, Law Rep. 1 C. C. 99, 100, 10 Cox C. C. 569; Reg. *v.* S., 5 Cox C. C. 279; Reg. *v.* Nasmith, 42 U. C. Q. B. 242; Cowley *v.* People, 21 Hun, 415, 417, 83 N. Y. 464.

[3] The terms of this statute are fully

did then and there wilfully permit the health of the said child to be injured and its life endangered; by then and there, wilfully, and well knowing the needs of said child, neglecting to provide for and give and administer to said child, proper, wholesome, and sufficient food, meat, drink, warmth, clothing, bed covering and means of cleanliness [*or*, proper and needed medical attendance, medicines, and nursing, the said child then and there being, and the said A then and there well knowing it to be, diseased, sick, and ailing in body and greatly in need of the same]; against the peace, &c.[1]

§ 753. **Abandoning Child — (On Statute).** — Under a statute making it a misdemeanor for any one to "unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered," the averments may be, —

That A, &c. on, &c. at, &c. did unlawfully and wilfully abandon and expose one X, a male child under the age of two years, whereby the life of the said child was endangered [by then and there laying and leaving the said child, on a cold night, insufficiently clothed, in a certain highway there]; against the peace, &c.[2]

§ 754. **Neglecting Lunatic — (On Statute).** — Under a statute making punishable any one who shall, "having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic, &c. in any way abuse, ill-treat, or wilfully neglect such lunatic," it seems to be accepted as adequate, though it is hardly specific enough on the general principles of criminal pleading,[3] to aver, —

That A, &c. on, &c. at, &c. having the care and charge and being concerned in the custody and treatment of one X, who was then and there a lunatic, did then and there unlawfully and wilfully neglect, abuse, and ill-treat the said lunatic X; against the peace, &c.[4]

§ 755. **Against Town for not maintaining Grammar School.** — A statute made it the duty of every town of two hundred families

covered without the common-law averment of the inability of the child to take care of itself. So that such averment, which does not appear in the precedent before me, seems not to be necessary. And see The State *v.* Davis, 70 Misso. 467.

[1] Cowley *v.* People, 21 Hun, 415, 417, 83 N. Y. 464.

[2] Reg. *v.* White, Law Rep. 1 C. C. 311, 12 Cox C. C. 83. If the indictment in this case is fully given in the reports, as it would seem to be in Cox, though there are no marks of quotation, it does not allege the name of the child, or contain the matter which I have here inserted in brackets. The safer course for the pleader is to retain all this matter, though doubtless not all courts will hold it to be necessary. See Crim. Proced. I. § 624, 625.

[3] Ante, § 753, note.

[4] Reg. *v.* Porter, Leigh & C. 394, 9 Cox C. C. 449; Reg. *v.* Smith, 14 Cox C. C. 398. And see Reg. *v.* Rundle, Dears. 482, 6 Cox C. C. 549; The State *v.* Davis, 70 Misso. 467.

or householders to be provided with a grammar schoolmaster, of good morals, well instructed in the Latin, Greek, and English languages. And another section directed that no one should be employed as such schoolmaster unless he was educated at some college, and had certain credentials, &c., — a sort of provision which the rules of pleading upon statutes do not require to be covered by allegations.[1] Thereupon it was adjudged good to aver, —

That the town of A, &c. on, &c. and thence continually until, &c. [ante, § 83], at, &c. did and still does contain two hundred families and upwards; and, during all of said time [ante, § 84] did and still does there neglect to procure and support a grammar schoolmaster, of good morals, well instructed in the Latin, Greek, and English languages, to instruct the children and youth in said languages [which is in subversion of that diffusion of knowledge, and in hindrance of that promotion of education, which the principles of a free government require and which the constitution of the Commonwealth enjoins[2]]; against the peace, &c.[3]

§ 756. **Neglects resulting in Death.** — The forms for these are sufficiently explained under the title "Homicide."[4]

§ 757. **Other Neglects.** — The forms for other neglects are easily drawn in analogy to the foregoing.[5]

§ 758. **Other Titles.** — The practitioner should not overlook the other titles wherein forms for various neglects under them appear.

[1] Crim. Proced. I. § 632, 639.

[2] There is no reason to suppose that the matter in these brackets, though in the form before me, is essential. It is not in the old books of precedents, and it is within what is explained ante, § 44–49.

[3] Commonwealth *v.* Dedham, 16 Mass. 141.

[4] Ante, § 529–531. For loss of life through neglect of corporations, common carriers, proprietors of steamboats, railroads, &c. Commonwealth *v.* East Boston Ferry, 13 Allen, 589; The State *v.* Gilmore, 4 Fost. N. H. 461.

[5] Non-repair of sea beach, Reg. *v.* Baker, Law Rep. 2 Q. B. 621. Not repairing jail, 4 Went. Pl. 363. Not coming to church, Rex *v.* Fenton, Trem. P. C. 267. Against selectmen of a town for neglecting to raise and apply money for the relief of soldier's family, The State *v.* Fitts, 44 N. H. 621. Against firemen and engineers of engines for neglects, 10 Cox C. C. App. 45; Reg. *v.* Pardenton, 6 Cox C. C. 247. Endangering lives of railroad employees, People *v.* Dunkel, 39 Mich. 255, 256, note. Crossing bar without pilot, The State *v.* Penny, 19 S. C. 218. Master of vessel leaving seamen behind in foreign land, Reg. *v.* Smison, 1 Cox C. C. 188; Reg. *v.* Dunnett, 1 Car. & K. 425. Signs at road crossings, not erecting, The State *v.* Manchester, 3 Baxter, 416; The State *v.* Loudon, 3 Head, 264; Louisville, &c. Turnpike *v.* The State, 3 Heisk. 129. Not putting up notice of hours in a day's work, Commonwealth *v.* Osborn Mill, 130 Mass. 33. Negligently compounding medicine, The State *v.* Smith, 66 Misso. 92.

CHAPTER LX.

NEUTRALITY LAWS, OFFENCES AGAINST.[1]

§ 759. **In General.** — Acts of Parliament and of Congress have created, in England and the United States, various offences against the neutrality of the enacting power, chiefly applicable in times of war between friendly nations. Our own occupy a chapter in the Revised Statutes of the United States,[2] and there are provisions of later dates.

§ 760. **As to Precedents.** — The English and American statutes are similar. And the books contain some precedents of the indictment on them. Such forms are seldom called for, and, when they are needed, it is a simple matter to examine them in their original sources. Therefore the author deems that he shall best serve the reader by merely referring to the places where they may be found, and devoting the space thus saved to what will be oftener required in practice.[3]

[1] Crim. Law, I. § 482. And see Ib. § 481–485.

[2] R. S. of U. S. § 5281–5291.

[3] Attempting to make, unlicensed, enlistments for the service of a foreign power, 9 Cox C. C. App. 58. Equipping vessel to be employed by one foreign state against another, 4 Ib. App. 27. Enlisting men to serve as sailors in war vessels against foreign friendly powers, Reg. *v.* Jones, 4 Fost. & F. 25; Reg. *v.* Rumble, 4 Fost. & F. 175; Reg. *v.* Corbett, 4 Fost. & F. 555. Illegal privateering, Henfield's Case, Whart. St. Tr. 49, 66. Issuing commission, &c. United States *v.* Reyburn, 6 Pet. 352. Fitting out vessel for foreign service, United States *v.* Quincy, 6 Pet. 445. Setting on foot, and preparing means for, an expedition against a friendly power, United States *v.* Lumsden, 1 Bond, 5.

For NIGHT-WALKERS, see VAGRANCY, &c.
NOISES, see NUISANCE.
NON-FEASANCE, see MALFEASANCE, &c.

CHAPTER LXI.

NOXIOUS AND ADULTERATED FOOD[1] AND THE LIKE.

§ 761. **Elsewhere — Here.** — The public nuisance of rendering food and drink noxious, the same as of making the air impure or offensive, belongs to the next chapter. Still something of what may be deemed *quasi* nuisance falls appropriately within the present title.

§ 762. **Nature of Offence and Indictment.** — This wrong, like various others, instead of being punishable by reason of distinct principles of its own, derives its criminal quality from the differing principles which govern other and less mixed crimes, operating in the several classes of these cases in differing degrees. Thus, it is a species of cheat, or attempt to cheat; and some sorts of it are almost purely such, while other sorts have but little of this ingredient. Again, it is a species of assault and battery, the battery being inflicted by the deleterious food taken into the stomach, or it is an attempt to commit such battery; and some sorts of it are almost purely such, while others have less of this quality. Once more, it is a species of common nuisance; and some sorts of it are almost purely such, while others have little of this kind of offending. And the result is, that the indictments, if skilfully and properly drawn, will vary with the cases; in some, it will be much like the non-technical indictment for assault and battery;[2] in others, be similar to that for the common-law cheat;[3] and, in others, resemble the forms for nuisance, to be considered in the next chapter. Hence, —

§ 763. **Formula.** — There can be no helpful formula for the indictment, adapted to all cases, except in outline. The allega-

[1] For expositions of offences connected with, see Crim. Law, I. § 484, 491, 558; Crim. Proced. I. § 524, note; II. § 868, 878; Stat. Crimes, § 988 *b*, note, 1124–1127. And consult CHEATS AT COMMON LAW — CONSPIRACY — NUISANCE.

[2] Ante, § 207–209, 214, 218, 225.

[3] Ante, § 272–275.

tions should vary with the sort of case, as well as with the special facts; and, if the proceeding is on a statute, with the statutory words. They may be, for example, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did unlawfully and maliciously mix and mingle together flour, water, and sundry deleterious and poisonous substances to the jurors unknown,[1] and bake the compound into loaves intended to resemble and resembling good and wholesome bread, and did then and there unlawfully and maliciously expose the same for sale and sell the same as and for good and wholesome bread fit and good for human food, and in particular did then and there unlawfully and maliciously sell one loaf thereof to one X as and for such bread; whereas, in truth and in fact, the said loaves then and there were not good and wholesome bread, and were not fit to be eaten by man, but were a poisonous and deleterious compound [*or*, setting out any other wrong within the title of this chapter according to its particular nature and special facts]; all of which the said A then and there well knew; against the peace, &c. [ante, § 65–69].[2]

§ 764. **Selling Noxious Bread — (Common Form).** — A form adjudged in an English case good at the common law, and by Chitty transferred into his book of precedents, is, with slight omissions of what no one would deem material, —

That A, &c. on, &c. and thence continually during the period of six months next following [ante, § 81–84], at, &c. was employed and intrusted to make and deliver, for the use of the X Asylum there, at which asylum

[1] Compare with post § 764 and note.

[2] This formula, if accepted as a guide, will not cast upon the pleader any heavy burden of allegation. Still the reader will see, as we proceed, that in some respects it is a little more minute than the course of decision would seem to require. But it is hardly desirable in these cases, and perhaps not safe, to omit everything permitted by any court. For forms and precedents, see 2 Chit. Crim. Law, 556–560; 4 Cox C. C. App. 14; Rex *v.* Dixon, 3 M. & S. 11; Reg. *v.* Stevenson, 3 Fost. & F. 106; Webb *v.* Knight, 2 Q. B. D. 530; Francis *v.* Maas, 3 Q. B. D. 341; Sandys *v.* Small, 3 Q. B. D. 449.

Connecticut. — The State *v.* Stanton, 37 Conn. 421.

Georgia. — Downing *v.* The State, 66 Ga. 160.

Indiana. — Schmidt *v.* The State, 78 Ind. 41, 42.

Iowa. — The State *v.* Close, 35 Iowa, 570.

Massachusetts. — Commonwealth *v.* Boynton, 12 Cush. 499; Commonwealth *v.* Flannelly, 15 Gray, 195; Commonwealth *v.* O'Donnell, 1 Allen, 593; Commonwealth *v.* McCarron, 2 Allen, 157; Commonwealth *v.* Farren, 9 Allen, 489; Commonwealth *v.* Nichols, 10 Allen, 199; Commonwealth *v.* Raymond, 97 Mass. 567; Commonwealth *v.* Smith, 103 Mass. 444; Commonwealth *v.* Chase, 125 Mass. 202; Commonwealth *v.* Luscomb, 130 Mass. 42; Commonwealth *v.* Evans, 132 Mass. 11.

New Hampshire. — The State *v.* Buckman, 8 N. H. 203.

New York. — Goodrich *v.* People, 3 Parker C. C. 622, 19 N. Y. 574.

North Carolina. — The State *v.* Smith, 3 Hawks, 378.

Tennessee. — Levi *v.* The State, 4 Baxter, 289.

were children provisioned and fed to the number of one thousand and more, certain loaves of good household bread, for the use and supply of the said children, at and for a certain price to be to him the said A paid for the same; and that he the said A, being so employed and intrusted [but being an evil-disposed person and not regarding the laws, &c. with force and arms, &c.[1]], did, at the times and place aforesaid, unlawfully, falsely, fraudulently, and deceitfully [and for his own lucre[2]], in the course of the said employ, and in breach of his trust and duty,[3] deliver [and cause to be delivered[4]] unto Y and Z, being respectively officers and servants belonging to the said asylum, divers, to wit, two hundred and ninety-seven loaves of bread, as and for loaves of good household bread, for the use and supply of the said asylum and the children belonging to the same; whereas in truth and in fact the said loaves of bread were not good household bread, but on the contrary contained divers noxious and unwholesome materials not fit or proper for the food of man,[5] and the said A[6] well knew that the said loaves of bread were not good household bread, but that the same did contain such noxious materials; against the peace, &c.[7]

§ 765. **Flesh Meat for Food.** — Comparing the precedents, we may accept the following as a good form for the common-law offence of exposing for sale or selling unfit flesh of animals for food: —

That A, &c. on, &c. at, &c. at a public market there for the buying and selling of flesh meat for human food, did unlawfully and deceitfully expose publicly for sale a quantity of flesh[8] meat as and for sound and wholesome flesh meat fit for human food; whereas in truth and in fact it was not so, and this the said A then and there well knew[9] [*or*, on, &c. at, &c. did

[1] Unnecessary. Ante, § 43, 45, 46.

[2] There is no reason to suppose that the matter in these brackets is essential. Ante, § 631 and note. In like manner, the allegation that the defendant was to be paid for the bread is probably immaterial; but it seems appropriate enough, as introducing the element of cheat. Ante, § 762.

[3] Some would deem it prudent to repeat here the allegations of time and place, and so avoid a question, whatever they might think the strict law to be.

[4] The principle stated Crim. Proced. I. § 332, shows this clause to be immaterial. And see ante, § 621 and places there cited.

[5] It was objected that the noxious materials ought to have been specified. But the court thought otherwise; and Bayley, J said, "that it was peculiarly within the defendant's knowledge what materials he used, and it was a rule in pleading that a party may allege generally what is within the knowledge of the other party." Rex *v.* Dixon, infra, at p. 14. To the like effect is Goodrich *v.* People, 19 N. Y. 574.

[6] Perhaps, for the reason suggested in a previous note, some will choose to repeat the time and place here.

[7] Rex *v.* Dixon, 3 M. & S. 11, 2 Chit. Crim. Law, 559. And see the forms in the next three preceding pages of Chitty.

[8] As to the reason for using this adjective, see ante, § 592, note, "meat."

[9] Reg. *v.* Stevenson, 3 Fost. & F. 106. There being here no allegation of a sale, the charge may be deemed within the principle of attempt. And, in attempt, the defendant must contemplate the particular evil result. Crim. Law, I. § 729. Hence he must be aware of the deleterious quality, — an element which the cases seem generally to require even in the substantive form of this offence. See, for example, Commonwealth *v.* Boynton, 12

knowingly, deceitfully, and maliciously expose to sale and sell to divers persons to the jurors unknown (*or* to one X) divers quantities, to wit, five hundred pounds of beef, to be used and eaten as food for man, as and for good and wholesome beef and fit for the food of man; whereas in truth and in fact the said beef was not good and wholesome beef and was not fit for the food of man, but was unwholesome and diseased, and unfit to be eaten by man, and this the said A then and there well knew[1]; against the peace, &c.[2]

§ 766. **Poisoning Well.** — It is good at common law to allege, —

That A, &c. on, &c. at, &c. did maliciously put into the well there of one X, near to the dwelling-house of the said X, from which well, as the said A then and there knew, the said X and his wife and family were in the daily and constant habit of drawing water and drinking and using the same, sundry carcasses of dead rats [with the intent thereby to poison and render unwholesome the water of the said well, and to injure the said X and his said wife and family[3]]; by reason whereof the waters of the said well became [the said A then and there, and while putting the said carcasses into the said well, knowing they would become[4]] greatly corrupted, unwholesome, and poisonous, and the said X and his said wife and family were greatly injured by the drinking and using thereof; against the peace, &c.[5]

§ 767. *Various Forms under Statutes:* —

Unwholesome Provisions. — Under the words "knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer,"[6] the allegations may be, —

Cush. 499. Compare with Seibright *v.* The State, 2 W. Va. 591; Burnby *v.* Bollett, 16 M. & W. 644.

[1] Goodrich *v.* People, 3 Parker C. C. 622, 19 N. Y. 574.

[2] Probably the courts would not quite agree as to how much this indictment could be cut down and leave it good. In The State *v.* Smith, 3 Hawks, 378, the allegations, containing little but surplusage, were held good at the common law, —

That A, &c. on, &c. at, &c. did unlawfully, falsely, maliciously, mischievously, and deceitfully sell and dispose of, to one X and others, certain unwholesome and poisonous beef, and did then and there receive pay for the same; to the great injury of the said X and his family, to the great nuisance of the good citizens of the State, and against the peace, &c.

Diseased Cow. — For a form for selling a diseased cow in a public market, see 4 Cox C. C. App. 14.

[3] The matter in these brackets is not in the form before me. It is inserted here for the convenience of any pleader who may deem it essential. And see the next note.

[4] Not in the form before me; which, without the matter in either of these brackets, was adjudged good. Plainly these allegations strengthen the indictment, but probably most will deem it sufficient without them. Yet, for caution, if nothing more, their insertion may in some circumstances be wise.

[5] The State *v.* Buckman, 8 N. H. 203.

[6] Mass. R. S. c. 131, § 1.

That A, &c. on, &c. at, &c. did knowingly sell to one X a certain piece of diseased, corrupted, and unwholesome provisions, to wit, one hind leg of veal, then and there knowing the same to be diseased, corrupted, and unwholesome,[1] and without making the said condition of the said veal fully known to the said X; against the peace, &c.[2]

§ 768. **Having Unwholesome Meat for Sale.** — Under a provision to punish one who "kills for the purpose of sale any sick, diseased, or injured animal, or who sells or has in his possession with intent to sell the meat of any such sick or diseased or injured animal," — must it be averred, to cover the interpreted latter clause, that the defendant knew the unfit condition of the meat?[3] The majority of the court adjudged it necessary to allege that the intended sale was to be "for food." And so the following would seem to suffice, —

That A, &c. on, &c. at, &c. did unlawfully have in his possession, with the intent then and there to sell the same to be used and consumed for human food, the meat of certain sick, diseased, and injured hogs[4] [knowing the same so to be[5]]; against the peace, &c.[6]

§ 769. **Calf too Young.** — Upon the words "kills or causes to be killed, for the purpose of sale, any calf less than four weeks old," knowledge not being an affirmative element in the offence,[7] it will be good to aver, —

That A, &c. on, &c. at, &c. did unlawfully kill a certain calf less than four weeks old, with the intent then and there to sell the meat thereof [for human food[8]]; against the peace, &c.[9]

[1] This extending of the allegations beyond the mere words of the statute was held to be necessary. Compare with post, § 768, 769; but the reader will observe that the terms of the statutes differ.

[2] Commonwealth *v.* Boynton, 12 Cush. 499. The word "confectionery" would not be sufficiently definite in allegation. And see, for form, Commonwealth *v.* Chase, 125 Mass. 202.

[3] Ante, § 767 and note.

[4] In the form before me the expression here is, "the meat of certain sick, diseased, and injured animals, to wit, the meat of certain hogs." But as hogs are judicially known to be animals, this circumlocution is useless. Ante, § 346 and note.

[5] Not in the form before me. Whether necessary or not will depend on how the statute is interpreted. Ante, § 767 and note. I presume that, on this point, the just view, reconciling the cases and following the true reason of the law, does not require this allegation where neither the word "knowingly" nor its equivalent is in the statute, but otherwise where it is.

[6] Schmidt *v.* The State, 78 Ind. 41, 42. Compare with Commonwealth *v.* Raymond, 97 Mass. 567; post, § 769.

[7] Ante, § 651, note, and places there referred to; post, § 770.

[8] Not in the form before me. Ante, § 768.

[9] Commonwealth *v.* Raymond, 97 Mass. 567.

§ 770. **Adulterated Milk.** — In some of the States statutes, in terms not entirely identical, make it a crime to sell or keep for sale adulterated milk.[1] The Massachusetts provisions, which have varied more or less from time to time, are, in part, as appearing in the "Public Statutes," that one shall be punishable who, "by himself or by his servant or agent, or as the servant or agent of any other person, sells, exchanges, or delivers, or has in his custody or possession with intent to sell or exchange, or exposes or offers for sale or exchange, adulterated milk, or milk to which water or any foreign substance has been added." And, further on, that, "in all prosecutions under this chapter, if the milk is shown upon analysis to contain more than eighty-seven per cent of watery fluid, or to contain less than thirteen per cent of milk solids, it shall be deemed for the purposes of this chapter to be adulterated."[2] If, in the former of these provisions, the last "or" is interpreted in the sense of "to wit," so that the last clause is explanatory of the meaning of "adulterated milk,"[3] and if the latter provision is construed as declaring adulterated all milk below its standard of richness, whether a foreign substance has been added to it or not,[4] the description of the milk in the indictment need, on principle, be only that it is "adulterated," without anything as to the manner or elements of its adulteration.[5] In this view the averments may be simply, —

That A, &c. on, &c. at, &c. unlawfully sold to one X one quart of adulterated milk [*or*, had in his custody and possession one hundred gallons of adulterated milk, with intent to sell the same; *or*, exposed and offered for sale one hundred quarts of adulterated milk]; against the peace, &c.

The author is not aware that the books contain anything against the sufficiency of this form. But pleaders have been in the habit of charging the offence more voluminously, and so the courts have had no occasion to decide whether or not less of allegation would suffice. Thus, —

That A, &c. on, &c. at, &c. did unlawfully sell to one X [of M[6]], [for the sum of thirty-five cents[7]], a quantity, that is to say, eight quarts, of

[1] Stat. Crimes, § 1124–1127.

[2] Mass. Pub. Stats. c. 57, § 5, 9.

[3] Commonwealth *v.* Farren, 9 Allen, 489, 491.

[4] Commonwealth *v.* Luscomb, 130 Mass. 42, 44; Commonwealth *v.* Evans, 132 Mass. 11.

[5] Ante, § 663, note.

[6] Needless. Ante, § 78, 79.

[7] In most of our States not required. Ante, § 648 and note.

adulterated milk; that is to say, a certain quantity, to wit, six quarts and one pint of milk, to which a certain quantity, that is to say, three pints of water had been added; against the peace, &c.[1]

§ 771. **Adulterated Liquors.** — Where one is declared punishable "who shall manufacture, sell, or keep for sale any spirituous or intoxicating liquors, which are adulterated with any deleterious or poisonous ingredients; or shall manufacture, sell, or keep for sale any spirituous or intoxicating liquors made and compounded in imitation of the liquors known as rum, gin, brandy, whiskey, elder brandy, or wine, and which are adulterated with any deleterious or poisonous ingredients,"[2] the allegations for the keeping may be, —

That A, &c. on, &c. at, &c. did unlawfully keep for sale intoxicating liquors[3] [proceeding now on the former part of the statute] adulterated with deleterious and poisonous ingredients[4] [*or*, proceeding on the latter part of the statute, intoxicating liquor made and compounded in imitation of the liquor known as Port wine, and adulterated with deleterious and poisonous ingredients]; against the peace, &c.[5]

§ 772. **Other Forms,** — if required, may readily be drawn in analogy to the foregoing.[6]

[1] Commonwealth *v.* Evans, 132 Mass. 11. If the adulteration needs to be particularized, certainly, in reason, it may be done more briefly; as, "ten quarts of adulterated milk, consisting of a mixture of milk and water;" adding, if now the pleader is not satisfied, what is always the truth, "in proportions to the jurors unknown." Or, the method may be, "ten quarts of adulterated milk, whereof more than eighty-seven per cent was watery fluid, and less than thirteen per cent was milk solids." But, if the pleader does this, he must avoid the sort of variance which was fatal on a comparison of the allegations and proofs in Commonwealth *v.* Luscomb, 130 Mass. 42. For other precedents, see Commonwealth *v.* Farren, 9 Allen, 489; Commonwealth *v.* McCarron, 2 Allen, 157; Commonwealth *v.* Flannelly, 15 Gray, 195; Commonwealth *v.* O'Donnell, 1 Allen, 593; Commonwealth *v.* Smith, 103 Mass. 444; Commonwealth *v.* Nichols, 10 Allen, 199.

[2] Conn. Gen. Stats. of 1866, tit. 63, § 46.

[3] Ante, § 644 and note.

[4] Possibly some may question whether there should not be either some particularization here, or an allegation that the ingredients are to the jurors unknown. Still, on the whole, this form would seem to be sufficient. Ante, § 764 and note.

[5] The State *v.* Stanton, 37 Conn. 421. Under a statute making it penal to "sell, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser," a conviction was, in Webb *v.* Knight, 2 Q. B. D. 530 (and see Sandys *v.* Small, 3 Q. B. D. 449), sustained on the allegation, —

That A, &c. on, &c. at, &c. did unlawfully sell, to the prejudice of X, who was then and there the purchaser, a certain article of food, to wit, one pint of gin, which was not of the nature, substance, and quality of the article demanded by the said X; against the peace, &c.

[6] For keeping and selling kerosene oil below test, Downing *v.* The State, 66 Ga. 160. Adulterating seeds by dyeing, Francis *v.* Maas, 3 Q. B. D. 341.

CHAPTER LXII.

NUISANCE.[1]

§ 773. **Elsewhere.** — Under the title "Way," forms for the various injuries, including nuisances, to public carriage and foot ways, bridges, navigable rivers, public squares, harbors, and the like, will be given. Most of the other nuisances are for this chapter. But there are a few instances of what would be appropriate here being placed under another title; as, for example, the forms of indictment for the common nuisance of Sabbath-breaking are put into the chapter on the "Lord's Day."[2]

§ 774. **How Chapter divided.** — We shall begin with what is common to all nuisances, then proceed with particular ones. Thus, I. In General; II. Barratry; III. Bawdy-house; IV.

[1] For the direct expositions of the general law of nuisance, with the pleading, practice, and evidence, see Crim. Law, I. § 1071–1082; Crim. Proced. II. § 860–874. Incidental, Crim. Law, I. § 227, 236, 243, 244, 265, 316, 317, 341, 419–422, 433, 490, 491, 531, 792, 816–835; II. § 21, 227, 965, 967; Crim. Proced. I. § 183, 275, 393, 772, 1417; II. § 812; Stat. Crimes, § 20, 21, 156, note, 169, 208, note, 214, 252, 260 *a*, 968, 973, 974–977, 1070 and note. And see, under the several sub-heads, the references pertaining to them.

[2] Ante, § 662.

Combustible and other Dangerous Things; V. Common Scold; VI. Disorderly House; VII. Eavesdropping; VIII. Evil Shows and Exhibitions; IX. Exposure of Person; X. Gaming-house; XI. Injurious or Offensive Air; XII. Liquor and Tippling Shops; XIII. Making Self a Nuisance; XIV. Noxious and Offensive Trades and Business; XV. Offensive and Hurtful Noises; XVI. Unwholesome Food and Water.

I. *In General.*

§ 775. **Conclusion — ("To Common Nuisance," &c.).** — The question whether or not the indictment must conclude "to the common nuisance," &c. is considered in other connections. In some exceptional cases, there is ground for saying that it must; and, in some others, plainly it need not. For the mass of the cases there is for requiring it no reason which will bear scrutiny.[1] Yet as the pleader cannot ordinarily know in advance what some precedent-loving judge may hold, the safe course will be to have this conclusion printed in all his blanks[2] for nuisance, and thus forestall trouble. The form of it in the precedents varies. Examples are, "to the common nuisance of all the liege subjects of our said Lady the Queen there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways;"[3] "to the common nuisance of all the peaceable citizens of the State there residing, inhabiting, and passing;"[4] "to the common nuisance of all the liege subjects of our said Lord the King;"[5] "to the common nuisance of all the liege subjects of our said Lady the Queen;"[6] "to the common nuisance of all the citizens of the State of Indiana;"[7] "to the common nuisance of the public;"[8] "to the common nuisance of all the good citizens of this Commonwealth."[9] Plainly it suffices, and in reason it seems to be the best form, to say —

To the common nuisance of all the people, against the peace, &c. [as at ante, § 65–69].

[1] Crim. Proced. II. § 862–864. And as to particular nuisances, Ib. § 101, 200, 353, 810; Stat. Crimes, § 977.

[2] Ante, § 51.

[3] Archb. Crim. Pl. & Ev. 19th ed. 956.

[4] The State *v.* Bailey, 1 Fost. N. H. 343. Similar in Commonwealth *v.* Kimball, 7 Gray, 328.

[5] 3 Chit. Crim. Law, 672.

[6] Archb. Crim. Pl. & Ev. 10th ed. 637, 19th ed. 962.

[7] Mains *v.* The State, 42 Ind. 327, indictment adjudged ill, but on other grounds.

[8] The State *v.* Odell, 42 Iowa, 75.

[9] Commonwealth *v.* Mohn, 2 Smith, Pa. 243.

§ 776. **Classifications — Unity of Offence.** — The classifications of this offence, as indicated by our several sub-titles, are only for convenience. Intrinsically, the offence is one, — common nuisance. If, for example, a man at a particular time and place gathers stuffs offensive both to the sight and to the smell, and likewise noxious to the health, and exhibits and uses them in a manner corrupting also to the public morals, thus doing what is within several of our sub-heads, he commits simply one nuisance, and his entire wrong-doing may be charged in a single count. Or, if he keeps a place for bawdry, for tippling, for common gaming, and for the emission of offensive odors and noises, he thereby perpetrates one common nuisance, the particulars of which, embracing what would constitute a bawdy-house, a common gaming-house, a tippling-house, and one or two other sorts of nuisance, may be averred against him in one count; while, on the other hand, it is undoubtedly possible to carry on separate and distinct nuisances at the same time.[1]

§ 777. **Formula for Indictment.** — The particulars of the averments will appear under the subsequent sub-titles. What is common to all the cases may be, —

That A, &c. [ante, § 74–77], on, &c. [ante, § 80, *or* with the continuando as at ante, § 83, and see ante, § 81–84], at, &c. [ante, § 80, *adding*, when necessary, a setting out of the particular place], did, &c. [describing the individual nuisance, as see the sub-titles following]; to the common nuisance of all the people [ante, § 775], against the peace, &c. [ante, § 65–69].[2]

[1] For the matter of this section, I have not before me specific enunciations of judges, or collections of adjudged points, sufficient to satisfy gentlemen who believe nothing to be law except what appears in exact words in our books of reports. And still the truth of this matter is just as certain to the understanding of every competent practitioner, familiar with our books and with the course of the courts, as if it were printed letter for letter on every page of every law book in existence. Some illustrations of the doctrine may be seen in such cases as Commonwealth *v.* Ballou, 124 Mass. 26; Commonwealth *v.* Hill, 14 Gray, 24; Commonwealth *v.* Langley, 14 Gray, 21; Commonwealth *v.* Kimball, 7 Gray, 328; People *v.* Cunningham, 1 Denio, 524; Crim. Proced. II. § 106.

[2] For precedents and forms, see Archb. Crim. Pl. & Ev. 19th ed. 955, 960, 962, 966, 968, 987; 2 Chit. Crim. Law, 39–42, 48, 553–556; 3 Ib. 622–668, 671–677, 1136 *b*; 4 Went. Pl. 156, 190, 197, 213–227; 6 Ib. 384; 6 Cox C. C. App. 75–78; Trem. P. C. 195–199, 241; Rex *v.* White, 1 Bur. 333; Rex *v.* Higginson, 2 Bur. 1232; Rex *v.* Dewsnap, 16 East, 194; Rex *v.* Vantandillo, 4 M. & S. 73; Rex *v.* Burnett, 4 M. & S. 272; Rex *v.* Rogier, 1 B. & C. 272; Rex *v.* Taylor, 3 B. & C. 502; Rex *v.* Pedly, 1 A. & E. 822; Rex *v.* Tindall, 6 A. & E. 143; Reg. *v.* Albert, 5 Q. B. 37; Reg. *v.* Rosenthal, Law Rep. 1 Q. B. 93;

II. *Barratry.*[1]

§ 778. **Old Forms.** — The precedents for the indictment, as given in the older books, sufficiently appear in "Criminal Pro-

Reg. *v.* Saunders, 1 Q. B. D. 15, 13 Cox C. C. 116; Reg. *v.* Webb, 1 Den. C. C. 338, 2 Car. & K. 933; Reg. *v.* Henson, Dears. 24; Reg. *v.* Holmes, Dears. 207, 3 Car. & K. 360, 6 Cox C. C. 216; Reg. *v.* Lister, Dears. & B. 209, 210, note, 7 Cox C. C. 342, 344; Reg. *v.* Crawshaw, Bell C. C. 303, 8 Cox C. C. 375; Reg. *v.* Elliot, Leigh & C. 103; Reg. *v.* Barrett, Leigh & C. 263, 9 Cox C. C. 255; Reg. *v.* Thallman, Leigh & C. 326, 9 Cox C. C. 388; Reg. *v.* Stannard, Leigh & C. 349; Reg. *v.* Mutters, Leigh & C. 491; Reg. *v.* Rice, Law Rep. 1 C. C. 21, 10 Cox C. C. 155; Reg. *v.* Medley, 6 Car. & P. 292; Reg. *v.* Grey, 4 Fost. & F. 73; Reg. *v.* Bunyan, I Cox C. C. 74; Reg. *v.* Watson, 2 Cox C. C. 376; Reg. *v.* Orchard, 3 Cox C. C. 248; Reg. *v.* Pridmore, 3 Cox C. C. 578; Reg. *v.* Farrell, 9 Cox C. C. 446; Reg. *v.* Harris, 11 Cox C. C. 659; Reg. *v.* Reed, 12 Cox C. C. 1; Reg. *v.* Munro, 24 U. C. Q. B. 44, 46.

Alabama. — Wooster *v.* The State, 55 Ala. 217; Toney *v.* The State, 60 Ala. 97.

Arkansas. — The State *v.* Mathis, 3 Pike, 84; The State *v.* Hazle, 20 Ark. 156.

Colorado. — Chase *v.* People, 2 Col. Ter. 509.

Connecticut. — Cadwell *v.* The State, 17 Conn. 467; The State *v.* Main, 31 Conn. 572; The State *v.* Thomas, 47 Conn. 546.

Dakota. — Territory *v.* Stone, 2 Dak. 155, 160.

Florida. — King *v.* The State, 17 Fla. 183, 188.

Georgia. — Scarborough *v.* The State, 46 Ga. 26; Warner *v.* The State, 51 Ga. 426; Dohme *v.* The State, 68 Ga. 339.

Idaho. — People *v.* Buchanan, 1 Idaho Ter. 681; People *v.* Ah Ho, 1 Idaho Ter. 691; People *v.* Goldman, 1 Idaho Ter. 714.

Illinois. — Raymond *v.* People, 9 Bradw. 344.

Indiana. — Ellis *v.* The State, 7 Blackf. 534; Bloomhuff *v.* The State, 8 Blackf. 205; Cahle *v.* The State, 8 Blackf. 531; The State *v.* Zimmerman, 2 Ind. 565; McAlpin *v.* The State, 3 Ind. 567; Huber *v.* The State, 25 Ind. 175; Neaderhouser *v.* The State, 28 Ind. 257, 259; Farrell *v.* The State, 38 Ind. 136, 137; Crawford *v.* The State, 33 Ind. 304; Leary *v.* The State, 39 Ind. 544; Mains *v.* The State, 42 Ind. 327; Joseph *v.* The State, 42 Ind. 370; McLaughlin *v.* The State, 45 Ind. 338; Carr *v.* The State, 50 Ind. 178; Davis *v.* The State, 52 Ind. 488; Andery *v.* The State, 56 Ind. 328; Collins *v.* The State, 58 Ind. 5; Moses *v.* The State, 58 Ind. 185; Delano *v.* The State, 66 Ind. 348; Padgett *v.* The State, 68 Ind. 46; Douglass *v.* The State, 72 Ind. 385; The State *v.* Houck, 73 Ind. 37; Lorimer *v.* The State, 76 Ind. 495; The State *v.* Welch, 88 Ind. 308.

Iowa. — The State *v.* Maurer, 7 Iowa, 406; The State *v.* Cure, 7 Iowa, 479; The State *v.* Middleton, 11 Iowa, 246; The State *v.* Schilling, 14 Iowa, 455; The State *v.* Baughman, 20 Iowa, 497; The State *v.* Freeman, 27 Iowa, 333; The State *v.* Harris, 27 Iowa, 429; The State *v.* Stapp, 29 Iowa, 551; The State *v.* Allen, 32 Iowa, 248; The State *v.* Kaster, 35 Iowa, 221; The State *v.* Close, 35 Iowa, 570; The State *v.* Chartrand, 36 Iowa, 691; The State *v.* Jordan, 39 Iowa, 387; The State *v.* Alderman, 40 Iowa, 375; The State *v.* Odell, 42 Iowa, 75; The State *v.* Reininghaus, 43 Iowa, 149; The State *v.* Spurbeck, 44 Iowa, 667; The State *v.* Holmes, 56 Iowa, 588.

Kansas. — The State *v.* Teissedre, 30

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 63–69; Crim. Proced. II. § 98–103. Incidental, Crim. Law, I. § 541, 974, 975; Crim. Proced. I. § 470, 494, 530; II. § 863.

cedure," accompanied by all needful explanations.[1] Omitting their obvious surplusage, —

Kan. 476, 480; The State *v.* Nickerson, 30 Kan. 545, 547.

Kentucky. — Morrison *v.* Commonwealth, 7 Dana, 218; Overshiner *v.* Commonwealth, 2 B. Monr. 344; Smith *v.* Commonwealth, 6 B. Monr. 21; Wilson *v.* Commonwealth, 12 B. Monr. 2; Barring *v.* Commonwealth, 2 Duv. 95; Harlow *v.* Commonwealth, 11 Bush, 610.

Maine. — The State *v.* Sturdivant, 21 Maine, 9; The State *v.* Haines, 30 Maine, 65; The State *v.* Hart, 34 Maine, 36; The State *v.* Payson, 37 Maine, 361; The State *v.* Homer, 40 Maine, 438; The State *v.* Stevens, 40 Maine, 559; The State *v.* Collins, 48 Maine, 217; The State *v.* Boardman, 64 Maine, 523; The State *v.* Ruby, 68 Maine, 543.

Maryland. — Smith *v.* The State, 6 Gill, 425; Wheeler *v.* The State, 42 Md. 563; Clayton *v.* The State, 60 Md. 272.

Massachusetts. — Commonwealth *v.* Gowen, 7 Mass. 378; Jennings *v.* Commonwealth, 17 Pick. 80; Commonwealth *v.* Tilton, 8 Met. 232; Commonwealth *v.* Fisk, 8 Met. 238; Stratton *v.* Commonwealth, 10 Met. 217; Commonwealth *v.* Brown, 13 Met. 365; Commonwealth *v.* Smith, 6 Cush. 80; Commonwealth *v.* Moore, 11 Cush. 600; Commonwealth *v.* Haynes, 2 Gray, 72; Commonwealth *v.* Ashley, 2 Gray, 356; Commonwealth *v.* Kimball, 7 Gray, 328; Commonwealth *v.* Hoye, 9 Gray, 292; Commonwealth *v.* Buxton, 10 Gray, 9; Commonwealth *v.* Skelley, 10 Gray, 464; Commonwealth *v.* Hart, 10 Gray, 465; Commonwealth *v.* Kelly, 12 Gray, 175; Commonwealth *v.* Quinn, 12 Gray, 178; Wells *v.* Commonwealth, 12 Gray, 326; Commonwealth *v.* Howe, 13 Gray, 26; Commonwealth *v.* Barnes, 13 Gray, 26; Commonwealth *v.* Langley, 14 Gray, 21; Commonwealth *v.* Hill, 14 Gray, 24; Commonwealth *v.* Taylor, 14 Gray, 26; Commonwealth *v.* Donovan, 16 Gray, 18; Commonwealth *v.* Rumford Chemical Works, 16 Gray, 231; Commonwealth *v.* Welsh, 1 Allen, 1; Commonwealth *v.* Gallagher, 1 Allen, 592; Commonwealth *v.* Sullivan, 5 Allen, 511; Commonwealth *v.* Stahl, 7 Allen, 304; Commonwealth *v.* Walton, 11 Allen, 238; Commonwealth *v.* Greenen, 11 Allen, 241; Commonwealth *v.* Blake, 12 Allen, 188; Commonwealth *v.* Wright, 12 Allen, 190; Commonwealth *v.* Norton, 13 Allen, 550; Commonwealth *v.* Hawks, 13 Allen, 550; Commonwealth *v.* Harris, 101 Mass. 29; Commonwealth *v.* Smith, 102 Mass. 144; Commonwealth *v.* Martin, 108 Mass. 29, note; Commonwealth *v.* Bennett, 108 Mass. 27; Commonwealth *v.* Dunn, 111 Mass. 425, 426; Commonwealth *v.* Oaks, 113 Mass. 8; Commonwealth *v.* Shea, 115 Mass. 102; Commonwealth *v.* Campbell, 116 Mass. 32; Commonwealth *v.* McIvor, 117 Mass. 118; Commonwealth *v.* Costello, 118 Mass. 454; Commonwealth *v.* Bulman, 118 Mass. 456; Commonwealth *v.* Cardoze, 119 Mass. 210; Commonwealth *v.* Ballou, 124 Mass. 26; Commonwealth *v.* Kahlmeyer, 124 Mass. 322; Commonwealth *v.* Fraher, 126 Mass. 56; Commonwealth *v.* Ronan, 126 Mass. 59; Commonwealth *v.* Wardell, 128 Mass. 52; Commonwealth *v.* Sweeney, 131 Mass. 579; Commonwealth *v.* Lavonsair, 132 Mass. 1; Commonwealth *v.* Roberts, 132 Mass. 267.

Michigan. — Palmer *v.* People, 43 Mich. 414, 415.

Minnesota. — The State *v.* Reckards, 21 Minn. 47, 48.

Missouri. — The State *v.* Palmer, 4 Misso. 453; Neales *v.* The State, 10 Misso. 498; The State *v.* Gardner, 28 Misso. 90.

New Hampshire. — Lord *v.* The State, 16 N. H. 325; The State *v.* Lord, 16 N. H. 357; The State *v.* Bailey, 1 Fost. N. H. 343; The State *v.* Leighton, 3 Fost. N. H. 167; The State *v.* Noyes, 10 Fost. N. H. 279; The State *v.* Prescott, 33 N. H. 212; The State *v.* McGregor, 41 N. H. 407; The State *v.* Perkins, 42 N. H. 464; The State *v.* Wilson, 43 N. H. 415.

New Jersey. — Morris, &c. Railroad *v.* The State, 7 Vroom, 553, 554; The State *v.* Society for Useful Manuf. 13 Vroom, 504, 505.

New York. — People *v.* Sands, 1 Johns. 78; People *v.* Townsend, 3 Hill, N. Y. 479; People *v.* Cunningham, 1 Denio, 524;

[1] Crim. Proced. II. § 98–103.

§ 779. **Modified.** — It is believed that, for modern use, the following form, wherein the substance of the old precedents is preserved, will be found judicious: —

That A, &c. on, &c. [as at ante, § 80, *or* with the continuando as at ante, § 83, at the election of the pleader[1]], at, &c. was [*adding*, if the pleader chooses, for so are the old forms, and yet is] a common barrator, stirring up, moving, and procuring strifes, quarrels, suits, and controversies among the people; to the common nuisance of all the people [ante, § 775], against the peace, &c.[2]

III. *Bawdy-house.*[3]

§ 780. **Complicated with other Nuisances.** — In the facts of cases, bawdry and other elements of nuisance often exist together

Munson *v.* People, 5 Parker C. C. 16; Taylor *v.* People, 6 Parker C. C. 347; People *v.* Carey, Sheldon, 573.

North Carolina. — The State *v.* Langford, 3 Hawks, 381; The State *v.* Cobb, 1 Dev. & Bat. 115; The State *v.* Baldwin, 1 Dev. & Bat. 195; The State *v.* Roper, 1 Dev. & Bat. 208; The State *v.* Langford, 3 Ire. 354; The State *v.* Evans, 5 Ire. 603; The State *v.* Patterson, 7 Ire. 70; The State *v.* Wright, 6 Jones, N. C. 25.

Ohio. — Smith *v.* The State, 22 Ohio State, 539 (order for abatement); Crofton *v.* The State, 25 Ohio State, 249; Matthews *v.* The State, 25 Ohio State, 536.

Pennsylvania. — Commonwealth *v.* Eckert, 2 Browne, Pa. 249; Commonwealth *v.* Reed, 10 Casey, Pa. 275; Commonwealth *v.* Mohn, 2 Smith, Pa. 243; Commonwealth *v.* Van Sickle, Brightly, 69; Commonwealth *v.* Spratt, 14 Philad. 365.

Rhode Island. — The State *v.* Hopkins, 5 R. I. 53; Plastridge *v.* The State, 6 R. I. 76; The State *v.* Tracey, 12 R. I. 216.

South Carolina. — The State *v.* Purse, 4 McCord, 472; The State *v.* Rankin, 3 S. C. 438.

Tennessee. — Britain *v.* The State, 3 Humph. 203; The State *v.* Pennington, 3 Head, 299; Cornell *v.* The State, 7 Baxter, 520; The State *v.* Wheatley, 4 Lea, 230.

Texas. — The State *v.* Flynn, 35 Texas, 354; The State *v.* Griffin, 43 Texas, 538; Thompson *v.* The State, 1 Texas Ap. 56, 57; Lasindo *v.* The State, 2 Texas Ap. 59; Thompson *v.* The State, 2 Texas Ap. 82; Lowe *v.* The State, 4 Texas Ap. 34, 36; Johnson *v.* The State, 4 Texas Ap. 63; Thompkins *v.* The State, 4 Texas Ap. 161.

Vermont. — The State *v.* Nixon, 18 Vt. 70; The State *v.* Riggs, 22 Vt. 321; The State *v.* Paige, 50 Vt. 445; The State *v.* Haley, 52 Vt. 476.

Virginia. — Stephen *v.* Commonwealth, 2 Leigh, 759.

Wisconsin. — Taylor *v.* The State, 35 Wis. 298.

United States. — District of Columbia. United States *v.* Royall, 3 Cranch C. C. 618, 620; United States *v.* Holly, 3 Cranch C. C. 656, 658; United States *v.* Dixon, 4 Cranch C. C. 107; United States *v.* Jackson, 4 Cranch C. C. 483; United States *v.* Milburn, 4 Cranch C. C. 719; United States *v.* Benner, 5 Cranch C. C. 347; United States *v.* McDuell, 5 Cranch C. C. 391.

[1] Crim. Proced. II. § 103.

[2] For the precedents, see also 2 Chit. Crim. Law, 232 *a*; Rex *v.* Lever, Trem. P. C. 320; Rex *v.* Spencer, Trem. P. C. 224.

[3] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, I. § 1083–1096; Crim. Proced. II. § 104–122. Incidental, Crim. Law, I. § 361, 500, 686, 734, 974; Stat. Crimes, § 21, 279, 679.

in a house. The indictment may charge all in a single count, not being thereby rendered double.[1] Thus, —

§ 781. **Common-law Precedent.** — A precedent in an approved book, is, with its surplusage, —

That A, &c. on, &c. [and on divers days and times between that day and the day of taking this inquisition. *Better*, if the pleader chooses the continuing form,[2] to say] and thence continually until the day of the finding of this indictment[3] [with force and arms[4]], at, &c. a certain common bawdy-house [situate,[5] &c.] unlawfully and wickedly did keep and maintain; and, in the said house [for filthy lucre and gain[6]], divers evil-disposed persons, as well men as women, and whores, on the days and times aforesaid [*or*, during all the time aforesaid[7]], as well in the night as in the day, there unlawfully and wickedly did receive and entertain, and in which said house the said evil-disposed persons and whores, by the consent and procurement of the said A, on the days and times aforesaid, there did commit whoredom and fornication; whereby divers unlawful assemblies, riots, routs, affrays, disturbances, and violations of the peace [of our said Lord the King[8]], and dreadful, filthy, and lewd offences in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated; to the [great damage[9] and] common nuisance of all the people [ante, § 775, *or* liege subjects of our Lord the King], [in manifest destruction, ruination and subversion of youth and other people, their manners, conversation, estate, and obedience,[10] and] against the peace, &c.[11]

§ 782. **Abridged and Strengthened.** — The foregoing form may be considerably reduced in its words, without taking from it anything important. The following, for bawdry only, is believed to be good at the common law, and on any statute which it duly covers, and likewise to be stronger at one place than the ordinary precedents; thus, —

[1] Ante, § 776; Crim. Proced. II. § 106.

[2] Ante, § 81.

[3] Ante, § 82, 83.

[4] Unnecessary. Ante, § 43.

[5] Chitty says here, referring to J'Anson *v.* Stuart, 1 T. R. 748, 754, "*Semble*, it is necessary to state the local situation, and therefore it may be prudent here to say 'situate,' &c." 2 Chit. Crim. Law, 40, note. This suggestion seems not to have been followed in England, and the current books of practice do not contain this matter. Archb. Crim. Pl. & Ev. 19th ed. 960, 961. Evidently it is not necessary. Ante, § 179, 253, and the notes, and places therein referred to; Crim. Proced. II. § 111.

[6] Unnecessary. Crim. Proced. II. § 108.

[7] Ante, § 84.

[8] Evidently not necessary; *or*, if the pleader prefers, substitute "of the people of the State."

[9] Unnecessary. Ante, § 48.

[10] Needless, within the principles of ante, § 48; Crim. Proced. I. § 647.

[11] 2 Chit. Crim. Law, 39. Where bawdry only is to be charged, the pleader who chooses to follow literally an old precedent will be likely to prefer the one in Crim. Proced. II. § 105. Concerning the sufficiency of this sort of form, and for a suggestion toward its improvement, see post, § 782 and note.

That A, &c. on, &c. [adding the continuando if the pleader chooses[1]], at, &c. did unlawfully keep and maintain a house open to the public[2] night and day for common bawdry; enticing thereto and harboring therein lewd women and common prostitutes, and weak and deluded lascivious men attracted thereto by the said women and prostitutes, and enticing men and women to meet there for common bawdry; thereby causing and procuring common bawdry, fornication, and adultery to be committed therein night and day, and youths and others to be corrupted and ruined in body, mind, and estate; to the common nuisance of all the people [ante, § 775, 777], against the peace, &c.[3]

[1] Ante, § 777.

[2] **Open to Public.**— The words "open to the public" are new in this sort of indictment. In Mains *v.* The State, 42 Ind. 327, an indictment in the common form for keeping a disorderly house, including bawdry, was adjudged ill because, as the court deemed, it did not, by any averment of the special location of the house, or by any other averment, show an injury to the public; that is, to people not dwelling in the house. And see Crim. Law, I. § 1109. There is ground to argue that, contrary to the views of the learned tribunal in this case, the common form of allegation does show such injury to the public; and a strong evidence that it does, is its common acceptation as doing it. Still there is, at least, sufficient force in the views of this learned court to suggest the propriety of supplying the defect, whether regarded as real or supposed. And the introduction of the words we are considering seems fully to supply it, though they are not precisely such as were contemplated by the court as the natural method.

[3] It will be convenient for the reader to be referred here to some precedents, though they are a part of the same which are cited ante, § 777. 2 Chit. Crim. Law, 39; Reg. *v.* Stannard, Leigh & C. 349, 9 Cox C. C. 405; Reg. *v.* Barrett, Leigh & C. 263, 9 Cox C. C. 255; Reg. *v.* Rice, Law Rep. 1 C. C. 21, 10 Cox C. C. 155.

Alabama. — Wooster *v.* The State, 55 Ala. 217; Toney *v.* The State, 60 Ala. 97.

Connecticut. — Cadwell *v.* The State, 17 Conn. 467; The State *v.* Main, 31 Conn. 572.

Dakota. — Territory *v.* Stone, 2 Dak. 155, 160.

Florida. — King *v.* The State, 17 Fla. 183, 188.

Georgia. — Scarborough *v.* The State, 46 Ga. 26.

Idaho. — People *v.* Buchanan, 1 Idaho Ter. 681; People *v.* Ah Ho, 1 Idaho Ter. 691.

Illinois. — Raymond *v.* People, 9 Bradw. 344.

Indiana. — Mains *v.* The State, 42 Ind. 327.

Iowa. — The State *v.* Chartrand, 36 Iowa, 691; The State *v.* Alderman, 40 Iowa, 375; The State *v.* Odell, 42 Iowa, 75; The State *v.* Spurbeck, 44 Iowa, 667; The State *v.* Holmes, 56 Iowa, 588.

Kentucky. — Harlow *v.* Commonwealth, 11 Bush, 610.

Maine. — The State *v.* Homer, 40 Maine, 438; The State *v.* Stevens, 40 Maine, 559; The State *v.* Boardman, 64 Maine, 523.

Maryland. — Smith *v.* The State, 6 Gill, 425.

Massachusetts. — Jennings *v.* Commonwealth, 17 Pick. 80; Commonwealth *v.* Moore, 11 Cush. 600; Commonwealth *v.* Ashley, 2 Gray, 356; Commonwealth *v.* Kimball, 7 Gray, 328; Commonwealth *v.* Hart, 10 Gray, 465; Wells *v.* Commonwealth, 12 Gray, 326; Commonwealth *v.* Langley, 14 Gray, 21; Commonwealth *v.* Hill, 14 Gray, 24; Commonwealth *v.* Taylor, 14 Gray, 26; Commonwealth *v.* Donovan, 16 Gray, 18; Commonwealth *v.* Cardoze, 119 Mass. 210; Commonwealth *v.* Ballou, 124 Mass. 26; Commonwealth *v.* Lavonsair, 132 Mass. 1.

New Hampshire. — The State *v.* McGregor, 41 N. H. 407.

North Carolina. — The State *v.* Evans, 5 Ire. 603.

Ohio. — Crofton *v.* The State, 25 Ohio State, 249.

§ 783. **On Statute.** — As all statutory terms should be duly covered, the pleader will often from necessity, prudence, or good taste draw his indictment in words differing from the foregoing. Nor will he, on every statute, be required or care to enter into all the expansions which caution dictates in the common-law indictment.[1] For example, —

§ 784. **House of Ill-fame.** — The statutes of various States coincide in making it punishable for one to "keep a house of ill-fame, resorted to for the purpose of prostitution or lewdness." The indictment always and properly covers these terms, and some of the precedents expand also the allegations in analogy to the common-law indictment. But such expansion has been adjudged needless.[2] The neat and sufficient form is, —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment,[3] at, &c. did unlawfully keep and maintain a certain house of ill-fame,[4] resorted to for the purposes of prostitution and lewdness; to the common nuisance of all the people,[5] against the peace, &c.[6]

Tennessee. — The State *v.* Wheatley, 4 Lea, 230.

Texas. — Thompson *v.* The State, 1 Texas Ap. 56, 57; Lasindo *v.* The State, 2 Texas Ap. 59; Thompson *v.* The State, 2 Texas Ap. 82; Tompkins *v.* The State, 4 Texas Ap. 161; Lowe *v.* The State, 4 Texas Ap. 34, 36.

Vermont. — The State *v.* Nixon, 18 Vt. 70.

[1] Thus, where an indictment simply covering the statutory words recited in our next section was objected to, Metcalf, J. speaking for the whole court, and holding the averments adequate, did not deem it necessary to consider whether or not they satisfied the common-law requirements, but said: "We are of opinion that this is a case in which an indictment so framed is sufficient; because no allegation of anything more than those words, *ex vi terminorum*, import, is necessary in order to show that the defendant has committed the statute offence." Commonwealth *v.* Ashley, 2 Gray, 356, 357.

[2] As see note to ante, § 783. Also, other cases cited infra, to this section.

[3] Or, without the continuando as the pleader elects. As to which, and the form of the continuando, and the exceptional doctrine in Massachusetts, see ante, § 81–84, and the places there cited. See also ante, § 775, 777.

[4] If the pleader chooses, he can add here, as at ante, § 782, "open to the public night and day." But, assuming this expression, or some substitute for it, to be necessary in the common-law indictment, I cannot see that it is therefore so in this. If the allegations without it do not show a public injury, they set out a violation of the statute, declared to be punishable, and no more can be required.

[5] Not in the form before me, nor do I deem it necessary. Still I should ordinarily retain this clause for the reason explained ante, § 775.

[6] Commonwealth *v.* Ashley, 2 Gray, 356. And for forms differing more or less from this one under the same statutory words, see The State *v.* Homer, 40 Maine, 438; The State *v.* Stevens, 40 Maine, 559; The State *v.* Odell, 42 Iowa, 75; The State *v.* Chartrand, 36 Iowa, 691; The State *v.* Spurbeck, 44 Iowa, 667; Cadwell *v.* The State, 17 Conn. 467. And on similar enactments, Commonwealth *v.* Kimball, 7 Gray, 328; Wells *v.* Commonwealth, 12 Gray, 326. **Texas.** — The Texas statute is differently expressed, but the indictment thereon is constructed on the same principles. See, for it and form, Thompson *v.*

§ 785. **Letting for Bawdry.** — There are differences of opinion as to the precise limits of this common-law offence, and the allegations required in the indictment.[1] If we adhere to what is believed to be the better American opinion, that the conniving landlord is answerable criminally as keeper,[2] the foregoing forms in this sub-title will suffice for the pleader. On the theory that the special facts must be set out, or even though they need not be,[3] it will be good to aver, —

That A, &c. on, &c. at, &c. unlawfully did knowingly let to one X a certain house there situate, of him the said A [*or*, of which he the said A had then and there the control and the power of letting out], with the intent that the said A should afterward, during the continuance of the said letting and lease thereof, there keep and maintain the same as a common bawdy-house [open to the public night and day[4]]; and, after the said letting, on the day and year aforesaid, and thence continually to the day of the finding of this indictment, the said X did, with the connivance and procurement of the said A as aforesaid, there keep and maintain the said house as a common bawdy-house [open to the public night and day], [causing and procuring great numbers of lewd and debauched men and women, common prostitutes, and rakes, therein to assemble and remain night and day, whoring, committing fornication and adultery, misbehaving themselves, and debauching their own and the public morals and manners[5]]; against the peace, &c.[6]

§ 786. **Same on Statute.** — A statute made punishable any person "knowingly permitting," among other things, "any house or building" "to be used or occupied" "as a house of ill-fame, or for the purpose of prostitution." And it would seem adequate in allegation simply to cover the statutory terms, as before explained;[7] but the precise question has probably not been adjudged. The substance of needlessly prolix averments, which in one case were sustained, is, —

The State, 2 Texas Ap. 82. And for other forms see the other cases cited ante, § 782, note, "Texas."

[1] Crim. Law, I. § 1090–1096; Crim. Proced. II. § 119, 120.

[2] Crim. Proced. I. § 119.

[3] Ib. § 120.

[4] Not in the form before me, but here introduced for the reason explained ante, § 782, note.

[5] Not in the form before me, which was adjudged sufficient; but it is not unlikely that some courts might deem matter of this sort important.

[6] After the precedent in Smith *v.* The State, 6 Gill, 425. The indictment was on the common law, and was adjudged sufficient. In the transcribing I have slightly strengthened it, but not much, except by the matter in brackets. Compare with the form, which was sustained, in Rex *v.* Pedly, 1 A. & E. 822. For other forms, see Commonwealth *v.* Moore, 11 Cush. 600; Territory *v.* Stone, 2 Dak. 155, 160; The State *v.* Wheatley, 4 Lea, 230; Crofton *v.* The State, 25 Ohio State, 249.

[7] Ante, § 783, 784.

That A, &c. on, &c. at, &c. being the owner of a certain house there situate, did then and there unlawfully and knowingly permit one X to use and occupy the same as, and for the purpose of keeping therein, a house of ill-fame, and for the purpose of common prostitution [the statute would seem now to be fully covered, but the form proceeds with what is probably surplusage; namely], and therein, then and there, to keep divers, to wit, five female persons, whose names are to the jurors unknown, for the purpose of prostitution, with the intent that they should therein, then and there, have illicit carnal intercourse and commit whoredom with divers, to wit, ten men, whose names are to the jurors unknown; to the common nuisance of all the people [ante, § 775], against the peace, &c.[1]

§ 787. **Other Forms.** — The offence under statutes, and even under the common law, may occasionally present itself in aspects different from those already contemplated in this sub-title,[2] but further expositions do not seem required.

IV. *Combustible and other Dangerous Things.*[3]

§ 788. **Explosive Substance.** — The allegations for the common-law offence, adapting to our use a form adjudged good in England, may be, —

That A, &c. on, &c. at, &c. not regarding the lives and security of the people, unlawfully, knowingly, and wilfully did deposit in a certain warehouse and premises of him the said A, and near to divers streets and common highways there, and to divers dwelling-houses of good and quiet people there residing, to wit, in N lane in M aforesaid, divers large and excessive quantities of a certain dangerous, ignitable, and explosive fluid called wood naphtha, to wit, ten thousand gallons thereof, and there, from the day aforesaid continually until the day of the finding of this indictment, unlawfully, knowingly, and wilfully did keep in the said warehouse and premises and near to the streets, highways, and dwelling-houses aforesaid, the said fluid in such large, excessive, and dangerous quantities as aforesaid; by reason whereof, during the time aforesaid, the people passing and proceeding in, through, and along the said streets and highways, and those residing and being near to the said warehouse and premises, were in great danger and peril of their lives and property, and were kept in great alarm,

[1] Crofton *v.* The State, 25 Ohio State, 249.

[2] **Dance Hall.** — For a form for keeping a dance hall, where men and women assemble, then go away for prostitution, Commonwealth *v.* Cardoze, 119 Mass. 210. **Patronizing.** — For a form for patronizing a house of ill-fame contrary to a statute, Raymond *v.* People, 9 Bradw. 344. **Residing.** — For residing in a bawdy-house, People *v.* Ah Ho, 1 Idaho Ter. 691.

[3] For the direct expositions, see Crim. Law, I. § 1097–1100. Incidental, Ib. I. § 318, 531, 832, 1080; Stat. Crimes, § 20, 21, 1112.

fear, and terror, and were greatly impeded, disturbed, and incommoded in the performance of their lawful occupations, and prevented and deterred from using the said streets and highways, and from passing and repassing over, through, and along the same as otherwise and but for the premises aforesaid they could, might, and ought to have done; to the common nuisance of all the people [ante, § 775], against the peace, &c.[1]

§ 789. **Ferocious Dog.** — Adapting and modifying to our use an English precedent, and so strengthening it that it will more certainly satisfy the requirements of the common law on which it is drawn, we have, —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment [ante, § 777], at, &c. did knowingly and unlawfully keep unmuzzled and at large, near unto a certain highway there, whereon people were constantly travelling and passing and having occasion to travel and pass, a certain large dog, which during all said time was there, as the said A well knew, fierce, ferocious, and dangerous, and used and accustomed to bite mankind; by reason whereof, during all said time, the people aforesaid could not there go, return, pass, and labor in and through the said common highway without great hazard and danger of being bitten, maimed, and torn by the said dog; to the common nuisance of all the people [ante, § 775], against the peace, &c.[2]

§ 790. **Elsewhere and other Forms.** — Under some of our other sub-titles, particularly the eleventh, there are forms which some would deem appropriate here. And see the note.[3]

V. *Common Scold.*[4]

§ 791. **No Old Precedents.** — Though this offence seems often to have been prosecuted in the forming periods of our law, singularly not a single precedent for the indictment has, it is believed,

[1] Reg. *v.* Lister, Dears. & B. 209, 7 Cox C. C. 342. This case was carefully and twice argued, once before the entire twelve judges, both as to the indictability of the facts, and as to the sufficiency of the averments. The judgment was practically unanimous. In People *v.* Sands, 1 Johns. 78, which was an indictment for keeping, and for transporting through the streets, large quantities of gunpowder under circumstances analogous to these, the particular allegations were by the majority of the court held not duly to point out the danger.

[2] 3 Chit. Crim. Law, 643. For a like form, see United States *v.* McDuell, 5 Cranch C. C. 391. For knowingly keeping an unruly bull in a field through which there was a public footway, 3 Chit. Crim. Law, 642.

[3] For emitting from a locomotive, sparks which caused fires, Morris, &c. Railroad *v.* The State, 7 Vroom, 553, 554.

[4] For the direct expositions, see Crim. Law, I. § 1101–1105; Crim. Proced. II. § 199–201. Incidental, Crim. Law, I. § 540, 943; Crim. Proced. I. § 470, 494; II. § 863.

come down to us. And only in American books can any form for it be found. Still, —

§ 792. **Form.** — The principles on which the indictment should be constructed are stated in the English books and confirmed in the American. It may allege, —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment [ante, § 777], at, &c. was a common scold, continually scolding and disturbing the peace of the neighborhood and of all good and quiet people; to the common nuisance of all the people [ante, § 775], against the peace, &c.[1]

VI. *Disorderly House.*[2]

§ 793. **Elsewhere.** — A bawdy-house being a species of disorderly house, what is said under the sub-title "Bawdy-house"[3] should be consulted as a part of this sub-title. It is so also, in a degree or fully, of the sub-titles "Evil Shows and Exhibitions," "Gaming-house," "Liquor and Tippling Shops," and "Noxious and Offensive Trades and Business."

§ 794. **Formula for Indictment.** — No formula, differing from what is given under the sub-title "Bawdy-house," is required here.[4]

[1] This is, in substance, yet not entirely in exact words, one of two counts, both of which were held good, in Commonwealth *v.* Mohn, 2 Smith, Pa. 243. The other count alleged, —

That the said A, on, &c. [as before], at, &c. [being an evil-disposed person, *unnecessary*, ante, § 46], [and designing, contriving, and intending the morals as well of youth as of divers other citizens of this Commonwealth to debauch and corrupt, *probably mere surplusage*], openly and publicly with a loud voice, in the public highways, wicked, scandalous, and infamous words did utter in the hearing of the citizens of the Commonwealth [concluding as in other cases].

It seems to me that there is more room to doubt the sufficiency of this form in general American practice than the one in the text. The offence here charged is, not the continual brawl of the common scold, where the impossible setting out of the words is not required, but the uttering of scandalous and infamous words in the highways. Compare with ante, § 241–243, 632–635. Should not the words, in this sort of case, be alleged? It seems to me not improbable that some of our judges would hold that they must be. In connection with the form in the text, consult the somewhat more voluminous one in United States *v.* Royall, 3 Cranch C. C. 620. And compare with United States *v.* Royall, 3 Cranch C. C. 618, where a form not greatly differing from the one in this note was adjudged ill.

[2] For the direct expositions of the law, pleading, evidence, and practice relating to this offence, see Crim. Law, I. § 1106–1121; Crim. Proced. II. § 272–283. Incidental, Crim. Law, I. § 318, 361, 504; Crim. Proced. I. § 474.

[3] Ante, § 780–787.

[4] Ante, § 782. For precedents, see 2 Chit. Crim. Law, 39, 40; 3 Chit. Crim. Law, 673; 6 Cox C. C. App. 78; Rex *v.* Higginson, 2 Bur. 1232; Reg. *v.* Pridmore, 3 Cox C. C. 578; Reg. *v.* Munro, 24 U. C. Q. B. 44, 46.

Indiana. — Bloomhuff *v.* The State, 8 Blackf. 205; Farrell *v.* The State, 38 Ind.

§ 795. **Common Form.** — A common form of the indictment is, —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment [ante, § 81–84, *or*, if the pleader chooses, omitting the continuando, ante, § 80, 81], at, &c. [with force and arms [1]] a certain common, ill-governed, and disorderly house [open to the public, *or* open to the public night and day [2]] unlawfully did keep and maintain; and, in said house [for his own lucre and gain [3]], certain evil-disposed persons, as well men as women, of evil name, fame, and conversation, to come together, on the days and times aforesaid, there unlawfully and willingly did cause and procure; and the said persons in the said house at unlawful times, as well in the night as the day, on the days and times aforesaid, there to be and remain drinking, tippling, cursing, swearing, quarrelling, and otherwise misbehaving themselves, unlawfully did permit and suffer; to the common nuisance of all the people [ante, § 775, 777], against the peace, &c.[4]

VII. *Eavesdropping.*[5]

§ 796. **As to Precedents — Elsewhere.** — The English books furnish no precedents of the indictment for this offence. A form suggested by the present author is given in "Criminal Procedure." [6]

§ 797. **About Grand-jury Room.** — We have an American precedent for eavesdropping about a grand-jury room, — adjudged to be indictable at the common law.[7] But it is too slovenly in

136, 137; Leary *v.* The State, 39 Ind. 544; Mains *v.* The State, 42 Ind. 327.

Iowa.—The State *v.* Maurer, 7 Iowa, 406.

Kentucky. — Smith *v.* Commonwealth, 6 B. Monr. 21; Wilson *v.* Commonwealth, 12 B. Monr. 2.

Massachusetts. — Commonwealth *v.* Kimball, 7 Gray, 328; Commonwealth *v.* Bulman, 118 Mass. 456.

Minnesota. — The State *v.* Reckards, 21 Minn. 47, 48.

New Hampshire. — The State *v.* Bailey, 1 Fost. N. H. 343.

New York. — People *v.* Carey, Sheldon, 573.

North Carolina. — The State *v.* Patterson, 7 Ire. 70; The State *v.* Wright, 6 Jones, N. C. 25.

Texas. — The State *v.* Flynn, 35 Texas, 354; Johnson *v.* The State, 4 Texas Ap. 63.

United States. — United States *v.* Benner, 5 Cranch C. C. 347.

[1] Not necessary. Ante, § 43.

[2] Not in the precedent before me, or generally employed. The reasons for inserting this matter are explained ante, § 782, note; Crim. Proced. II. § 273, note.

[3] Unnecessary. Crim. Law, I. § 1112; Crim. Proced. II. § 274.

[4] The State *v.* Bailey, 1 Fost. N. H. 343; 2 Chit. Crim. Law, 40; Rex *v.* Higginson, 2 Bur. 1232; Smith *v.* Commonwealth, 6 B. Monr. 21; Commonwealth *v.* Bulman, 118 Mass. 456. So far as I see, this form appears to have originated in Rex *v.* Higginson, supra, though it may have been in earlier use.

[5] For the direct expositions of this offence and the procedure, see Crim. Law, I. § 1122–1124; Crim. Proced. II. § 312, 313. Incidental, Crim. Law, I. § 540.

[6] Crim. Proced. II. § 312.

[7] "If," said Caruthers, J. "it be an indictable offence to clandestinely hearken to

construction to admit of preservation, in exact terms, for future use. In substance, it is, —

That on, &c. at N, in the county of M, the grand jury of said county were duly assembled and holding a secret session in their room in the court house in said N, hearing evidence against persons accused of crimes committed within their jurisdiction, deliberating thereon, and otherwise duly transacting business within their jurisdiction; whereupon A, &c. did then and there unlawfully and stealthily approach and come near to their said room, wherein and while they were so in such session there, transacting and discharging their aforesaid business and duties, with the purpose of him the said A of unlawfully and stealthily listening to and overhearing, and he did then and there unlawfully and stealthily listen to and overhear, what was then and there, in the aforesaid room, done, said, and transacted, and did then and there unlawfully and stealthily, for a long time, to wit, five hours, continue and remain under the eaves and windows and otherwise near to and about said room, eavesdropping and gathering in forbidden knowledge of the secrets in said room transpiring; against the peace, &c.[1]

VIII. *Evil Shows and Exhibitions.*[2]

§ 798. **Keeping Room for Obscene Prints.** — A form of the indictment for exhibiting an obscene painting has already been given.[3] A room kept for a purpose of this sort is a species of disorderly house. The allegations under the common law, to follow a precedent neither very old nor very recent, may be, —

That A, &c. [being a person of wicked and depraved mind and disposition, and not regarding the common duties of morality and decency, but contriving and wickedly intending, as far as in him lay, to debauch and corrupt the morals as well of youth as of divers other persons, and to raise and create in their minds inordinate and lustful desires[4]], on, &c. [*adding*,

the discourse of a private family, by which only a private injury would be done, much more must it be to obtain, by the same unlawful means, the secrets of the jury room. The same salutary principle must cover both cases, and for a much stronger reason the latter. If the one be a nuisance, much more is the other. The proceedings of juries, both grand and petit, are so important to the life, liberty, and property of the citizen that they cannot be too carefully guarded. . . . It cannot be that the law has made no provision for the punishment of offences like this." The State *v.* Pennington, 3 Head, 299, 301.

[1] The State *v.* Pennington, supra.

[2] For expositions of this offence, see, under the title "Public Shows," Crim. Law, I. § 1145–1149; Crim. Proced. II. § 794 *b*, 795, 865. Incidental, Crim. Law, I. § 500, 504, 761, 1129; II. § 943; Stat. Crimes, § 214. And see ante, § 628–631.

[3] Ante, § 631. And see ante, § 629, note. For a precedent for exhibiting disgusting pictures, see Reg. *v.* Grey, 4 Fost. & F. 73.

[4] Most of the matter in these brackets is certainly surplusage, and there is no just ground to deem otherwise of any part of it. I should omit all. Ante, § 44–46, 286, 378, 463, 620, 630, and notes to a part of these sections.

if the pleader chooses, ante, § 81–84, and thence continually until the day of the finding of this indictment], [with force and arms[1]], at, &c. unlawfully, wickedly, and scandalously did keep and maintain a certain room in and parcel of a certain house there, for the purpose of exhibiting and exposing to the sight and view of any persons willing and desirous of seeing the same[2] and paying for their admission into said room, divers lewd, wicked, scandalous, infamous, bawdy, and obscene prints [too filthy and obscene to be more minutely described in these allegations[3]]; and, in said room, then [*or* during all the time aforesaid, ante, § 84] unlawfully, wickedly, and scandalously [for lucre and gain[4]] did exhibit and expose the said prints [and cause the same to be exhibited and exposed[6]] to the sight and view of divers and many people; [in contempt, &c. in violation of common decency and morality, to the great corruption of youth and increase of lewdness, to the evil and pernicious example of all others[6]], to the common nuisance of all the people,[7] against the peace, &c.[8]

§ 799. **Booth for Indecent Exhibition.** — Reducing to fewer words an English precedent under the common law, and omitting surplusage, we have, —

That A, &c. on, &c. at, &c. unlawfully and scandalously did keep and maintain a certain booth and shed wherein to exhibit and show to all persons willing to pay the said A for admission therein, and did then and there unlawfully and scandalously exhibit and show therein to many and sundry persons [whose names are to the jurors unknown[9]] divers wicked, scandalous, infamous, bawdy, and obscene performances, representations, practices, and figures, corrupting to the morals of the public and of youth [and too filthy and obscene to be in decency further described[10]]; to the common nuisance of all the people [ante, § 775], against the peace, &c.[11]

§ 800. **Public Cruelty to Animal.**[12] — Allegations, here slightly modified in the mere expression, have been held good for the common-law nuisance, —

That A, &c. on, &c. at, &c. near unto and within full view from certain highways there, whereon people in great numbers were constantly pass-

[1] Unnecessary. Ante, § 43.

[2] This allegation does not differ greatly in its effect from the one introduced, ante, § 782.

[3] This matter is not in the form before me, but some might deem the indictment safer with it. Ante, § 626, 631.

[4] Not necessary. Ante, § 631, note, and places there referred to.

[5] Not necessary. Ante, § 139 and note.

[6] Plainly, none of this matter is necessary. See, among other places, ante, § 48, 621, 622, 631, 755; Crim. Proced. I. § 647.

[7] Not in the form before me, but inserted for reasons stated ante, § 775.

[8] 2 Chit. Crim. Law, 48.

[9] Not in the form before me and probably not necessary, yet some pleaders might deem the insertion of this matter prudent. Ante, § 626, 631.

[10] Not in the form before me. See ante, § 798 and note.

[11] Reg. *v.* Saunders, 1 Q. B. D. 15, 13 Cox C. C. 116.

[12] Crim. Law, I. § 597; Stat. Crimes, § 1100.

ing and going, and within full view from great numbers of inhabited dwelling-houses, and within the actual view and sight of great numbers of people, did unlawfully, wantonly, and cruelly, with clubs and stones, beat, strike, and grievously wound and kill a certain cow [the property of one X[1]], [of the value of, &c.[2]], thereby disturbing the public peace, and terrifying and otherwise annoying all persons who were then and there either seeing or hearing the same; to the common nuisance of all the people, against the peace, &c.[3]

§ 801. **Other Forms** — may be drawn in analogy to the foregoing;[4] and still others appear in the next sub-title, which is but a continuation of this.

IX. *Exposure of Person.*[5]

§ 802. **Form, and how.** — Various precedents for the indictment are given in "Criminal Procedure."[6] It will be there seen that the authorities are not quite uniform as to how much of averment is indispensable under the common law. But the following form, it is believed, will satisfy all views, and be good also on any statute the terms of which it duly covers: —

That A, &c. on, &c. at, &c. did, in a certain highway there, whereon great numbers of people were then standing and passing [*or*, on the roof of a certain building there, within full view from the windows of large numbers of inhabited houses and of other buildings wherein were people congregated; *or*, in a certain public omnibus there, in the presence and in sight of great numbers of passengers therein; *or*, &c. particularizing, in like manner, any other place which is so far public that the offence may in law be committed in it], lasciviously and scandalously, with intent to corrupt the minds and manners of all lookers-on, expose, naked and uncovered, his private member and other of those parts of his body which decency requires to be clothed [*or*, the body and person of him the said A], to divers and sundry women and other persons then and there witnessing the

[1] In the form before me, but evidently not necessary. Stat. Crimes, § 1120. And see the precedents, ante, § 346 et seq.

[2] Not necessary, because the value is immaterial. Ante, § 346, note.

[3] United States *v.* Jackson, 4 Cranch C. C. 483. **Baiting Bull.** — For publicly baiting a bull, 3 Chit. Crim. Law, 627; 4 Went. Pl. 213. As to the meaning of "baiting," Stat. Crimes, § 1109.

[4] For exhibiting stage plays without license, contrary to a statute, Reg. *v.* Rosenthal, Law Rep. 1 Q. B. 93. Setting off fireworks in a public street, 3 Chit. Crim. Law, 628. Overseers of poor putting poor persons into an improper neighborhood and so creating a nuisance, 3 Chit. Crim. Law, 658.

[5] For the direct expositions of the law and procedure, see Crim. Law, I. § 1125–1134; Crim. Proced. II. § 351–356. Incidental, Crim. Law, I. § 244, 500; Stat. Crimes, § 717.

[6] Crim. Proced. II. § 351–356.

exhibition; to the common nuisance of all the people [ante, § 775], against the peace, &c.[1]

§ 803. **Under Statute.** — Some of our statutes are duly covered by briefer forms. Thus, under a provision to punish any one "guilty of an open and notorious act of public indecency, grossly scandalous," it is sufficient to aver, —

That A, &c. on, &c. at, &c. was guilty of [*or*, did commit] an open and notorious act of public indecency, grossly scandalous, by then and there, in the presence of a man and woman, exhibiting and exposing to view his private parts; to the common nuisance of all the people [ante, § 775], against the peace, &c.[2]

§ 804. **Another.** — If one is by a statute made punishable "who shall, in any public place, make any uncovered and indecent exposure of his or their person," the words "public place" will not alone suffice in allegation of the special locality, being too indefinite.[3] The averments may be, —

That A, &c. on, &c. at, &c. did, in the blacksmith shop of one X, a place open to the public, and into and out of which people were constantly going and passing, make an uncovered and indecent exposure of his person, by then and there openly, indecently, and lasciviously exhibiting the same nude and uncovered to all of divers and sundry persons then assembled there; to the common nuisance of all the people, against the peace, &c.[4]

[1] For precedents, see Archb. Crim. Pl. & Ev. 19th ed. 987; 2 Chit. Crim. Law, 41; Reg. *v.* Albert, 5 Q. B. 37; Reg. *v.* Webb, 1 Den. C. C. 338, 2 Car. & K. 933, 3 Cox C. C. 183; Reg. *v.* Holmes, Dears. 207, 3 Car. & K. 360, 6 Cox C. C. 216; Reg. *v.* Elliot, Leigh & C. 103; Reg. *v.* Thallman, Leigh & C. 326, 9 Cox C. C. 388; Reg. *v.* Bunyan, 1 Cox C. C. 74; Reg. *v.* Watson, 2 Cox C. C. 376; Reg. *v.* Orchard, 3 Cox C. C. 248; Reg. *v.* Farrell, 9 Cox C. C. 446; Reg. *v.* Harris, 11 Cox C. C. 659; Reg. *v.* Reed, 12 Cox C. C. 1.

Arkansas. — The State *v.* Hazle, 20 Ark. 156.

Indiana. — Andery *v.* The State, 56 Ind. 328; Lorimer *v.* The State, 76 Ind. 495.

Massachusetts. — Commonwealth *v.* Haynes, 2 Gray, 72; Commonwealth *v.* Wardell, 128 Mass. 52.

Missouri. — The State *v.* Gardner, 28 Misso. 90.

North Carolina. — The State *v.* Roper, 1 Dev. & Bat. 208.

Pennsylvania. — Commonwealth *v.* Spratt, 14 Philad. 365.

Tennessee. — Britain *v.* The State, 3 Humph. 203.

Texas. — The State *v.* Griffin, 43 Texas, 538.

[2] The State *v.* Gardner, 28 Misso. 90. I have here preserved the exact substance of a form which was held good. But on a similar statute in another State, where the question has not been adjudged, I should recommend the pleader to enlarge the allegations by some setting out of the place whereby publicity will appear, or of facts giving the transaction notoriety, if so the allegations will conform to the truth. Still, if the statute is interpreted to require only a private exhibition to one man and one woman, this form must be held sufficient, unless the averment of their names is deemed essential.

[3] Stat. Crimes, § 902–907.

[4] Lorimer *v.* The State, 76 Ind. 495. The text embodies the substance of this precedent, but departs considerably from it

X. *Gaming-house.*[1]

§ 805. **Form, and how.** — A common gaming-house is a species of disorderly house, so that the allegations under the other subtitles indicate how they should be under this. Precisely how little of averment will suffice is matter on which judicial opinions seem not quite to harmonize,[2] but no one doubts that many of the precedents contain a large proportion of surplusage. It is believed that all will accept the following form as good, whether on the common law, or on any statute the terms whereof it duly covers: —

That A, &c. on, &c. [adding the continuando or not as the pleader chooses, ante, § 81–84], at, &c. did unlawfully keep and maintain a common gaming-house, open to the public night and day,[3] and therein did then and there entice, congregate, and cause to come together great numbers of disorderly and idle persons and youth, playing therein at unlawful games for money and other valuable things, and betting and wasting their substance thereon, and otherwise misbehaving themselves, and leading and luring one another and all other persons to evil ways; to the common nuisance of all the people [ante, § 775, 777], against the peace, &c.[4]

in words, — perhaps for the better, perhaps not. For a form adjudged good under the Texas statute, see The State *v.* Griffin, 43 Texas, 538.

[1] For the direct expositions of this offence, with the pleading, evidence, and practice, see Crim. Law, I. § 1135–1137; Crim. Proced. II. § 487–494. Incidental, Stat. Crimes, § 847, 853, 878, 890–892, 895. And compare with the title GAMING.

[2] Crim Proced. II. § 275, 276, 488.

[3] Ante, § 782, note.

[4] For other forms and precedents, see Crim. Proced. II. § 488; Archb. Crim. Pl. & Ev. 10th ed. 637, 19th ed. 962; 3 Chit. Crim. Law, 673–678; 4 Went. Pl. 156; 6 Ib. 384; Rex *v.* Milner, Trem. P. C. 241; Rex *v.* Rogier, 1 B. & C. 272; Rex *v.* Taylor, 3 B. & C. 502.

Arkansas. — The State *v.* Mathis, 3 Pike, 84.

Colorado. — Chase *v.* People, 2 Col. Ter. 509.

Georgia. — Dohme *v.* The State, 68 Ga. 339.

Idaho. — People *v.* Goldman, 1 Idaho Ter. 714.

Indiana. — McAlpin *v.* The State, 3 Ind. 567; Crawford *v.* The State, 33 Ind. 304; Carr *v.* The State, 50 Ind. 178; Padgett *v.* The State, 68 Ind. 46.

Iowa. — The State *v.* Cure, 7 Iowa, 479; The State *v.* Middleton, 11 Iowa, 246.

Maine. — The State *v.* Haines, 30 Maine, 65.

Maryland. — Wheeler *v.* The State, 42 Md. 563.

Massachusetts. — Commonwealth *v.* Tilton, 8 Met. 232; Commonwealth *v.* Stahl, 7 Allen, 304.

Missouri. — The State *v.* Palmer, 4 Misso. 453.

New Hampshire. — Lord *v.* The State, 16 N. H. 325; The State *v.* Leighton, 3 Fost. N. H. 167; The State *v.* Noyes, 10 Fost. N. H. 279; The State *v.* Prescott, 33 N. H. 212.

North Carolina. — The State *v.* Langford, 3 Ire. 354.

United States. — District of Columbia. United States *v.* Holly, 3 Cranch C. C. 656, 658; United States *v.* Milburn, 4 Cranch C. C. 719; United States *v.* Dixon, 4 Cranch C. C. 107.

§ 806. **Abridged and Varied.** — Under adjudications in some of our States, and codes of procedure in others, these averments may be safely abridged. And everywhere, if the special facts are different, variations to cover them should be made. Thus, —

§ 807. **Bowling-alley.** — Following a form which was adjudged good, and omitting only what all concede to be surplusage, we have, at the common law, —

That A, &c. on, &c. at, &c. unlawfully and injuriously did keep and maintain a certain common and disorderly room called a bowling-alley [open to the public night and day [1]], and did then and there unlawfully and injuriously cause, procure, and suffer divers persons, to the jurors unknown, to frequent and come together at said bowling-alley for the purpose of bowling, and then and there to play therein at bowls in the daytime and also in the night-time; to the common nuisance of all the people [ante, § 775], against the peace, &c.[2]

§ 808. **On Statute.** — Where a statute makes punishable one who "shall keep any gaming-house or place, and shall suffer any person to play at cards, dice, billiards, or at any bowling-alley, or any game whatever therein for money, hire, gain, or reward," the averments may be, for example, —

That A, &c. on, &c. [adding the continuando or not as the pleader chooses, ante, § 81–84], at, &c. did keep a certain gaming place, and did then and there suffer and permit many idle, disorderly, and dissolute persons to play therein at games of cards and other games for money, for other hire, for gain, and for reward; to the common nuisance of all the people, against the peace, &c.[3]

§ 809. **Other Statutes.** — The statutes are various, and the particular one must be covered. But the pleader will need no further help.[4]

XI. *Injurious or Offensive Air.*[5]

§ 810. **Offence and Indictment.** — To render the air injurious to the health or offensive to the senses is not a sort of nuisance

[1] Not in the form before me. See ante, § 782 and note.

[2] The State *v.* Haines, 30 Maine, 65. And compare with the form in Lord *v.* The State, 16 N. H. 325.

[3] The State *v.* Prescott, 33 N. H. 212.

[4] See, for example, forms in Commonwealth *v.* Tilton, 8 Met. 232; McAlpin *v.* The State, 3 Ind. 567; Padgett *v.* The State, 68 Ind. 46; The State *v.* Noyes, 10 Fost. N. H. 279.

[5] For matter relating more or less di-

strictly separable from the rest; but, if one does this, and creates annoying noises, and otherwise disturbs or corrupts the public, all in a single transaction, he evidently commits only one indictable wrong.[1] The indictment should aver enough of the special locality to show it to be a place where the offence can in law be committed, say what the defendant did there; and, unless the consequence is obvious to the judicial understanding, state the effect on the air, or how otherwise it endangered or annoyed the public. Thus, —

That A, &c. on, &c. at, &c. near unto great numbers of dwelling-houses and divers highways, where great numbers of people were constantly abiding and passing, did, &c. [say what], whereby then and thence continually until the day of the finding of this indictment the air there and for a great distance around became and was noxious, injurious, and offensive to all persons surrounded by it; to the common nuisance of all the people [ante, § 775, 777], against the peace, &c.[2]

§ 811. **Necessary House.** — The allegations may be, —

That A, &c. on, &c. at, &c. near unto [*or*, within fifty feet of] a certain public and common highway there, whereon people were constantly passing and going, and near unto divers inhabited dwelling-houses there, did unlawfully erect and maintain a certain building called a necessary house [*or*, did continue, &c. theretofore erected, &c.], for the use of many and divers persons for necessary purposes, and thence continually until the day of the finding of this indictment did continue the same, and did there during all the aforesaid time keep the same and suffer it to remain in a filthy condition; whereby the air in the said public highway and in the said dwelling-houses and for a great distance round and about the said necessary house became, by reason of offensive and noxious odors emitted therefrom, greatly corrupted, offensive to the senses, and deleterious to the health, and so continued to

rectly to this offence, see, among other places, Crim. Law, I. § 489–492, 531, 1138, 1141, 1143; II. § 1273; Crim. Proced. II. § 877 *a*.

[1] Ante, § 776, 780.

[2] For forms and precedents, see 3 Chit. Crim. Law, 622, 629, 643, 647, 651–656; 4 Went. Pl. 213–219, 224, 225, 353; 6 Cox C. C. App. 76, 77; Rex *v.* Vantandillo, 4 M. & S. 73; Rex *v.* Burnett, 4 M. & S. 272; Rex *v.* Pedly, 1 A. & E. 822; Rex *v.* Henson, Dears. 24.

Iowa. — The State *v.* Kaster, 35 Iowa, 221; The State *v.* Close, 35 Iowa, 570.

Kentucky. — Barring *v.* Commonwealth, 2 Duv. 95.

Maine. — The State *v.* Payson, 37 Maine, 361.

Massachusetts. — Commonwealth *v.* Sweeney, 131 Mass. 579.

New York. — Munson *v.* People, 5 Parker C. C. 16.

Pennsylvania. — Commonwealth *v.* Van Sickle, Brightly, 69.

South Carolina. — The State *v.* Purse, 4 McCord, 472; The State *v.* Rankin, 3 S. C. 438.

Tennessee. — Cornell *v.* The State, 7 Baxter, 520.

Virginia. — Stephen *v.* Commonwealth, 2 Leigh, 759.

be and was during all the time aforesaid; to the common nuisance of all the people, against the peace, &c.[1]

§ 812. **Piggery.** — It is good to allege, —

That A, &c. on, &c. at, &c. near to a common highway there, whereon people were continually passing, and near to the dwelling-houses of divers people, did set up and erect, and thence continually to the day of the finding of this indictment did continue, a certain pen and enclosure wherein during all said time he did keep large numbers of hogs, and offal, and filth, and slops, and other noxious and offensive things for said hogs to feed upon and eat; by reason whereof noxious, vile, offensive, and deleterious odors were created and sent forth from said pen and enclosure, rendering the air near to and for a long distance from the same offensive and injurious to all persons there inhabiting, passing, and being; to the common nuisance of all the people, against the peace, &c.[2]

§ 813. **Other Filth.** — On the same principles as the last two forms are constructed the allegations for making the air foul by collecting any other filth.[3]

§ 814. **Small-pox.** — The indictment for endangering the public health by taking into the streets a person having the small-pox may aver, —

That on, &c. at, &c. one X was infected, ill, and sick with a certain contagious and dangerous disease and infection called the small-pox, liable to be communicated through the air and otherwise to other persons; whereupon A, &c. well knowing these premises, did then and there unlawfully take and carry the said X into, in, and along a certain highway there whereon were multitudes of people constantly going and passing, and near to dwelling-houses in large numbers wherein were multitudes of people abiding, and among multitudes of people, to the great and manifest danger of infecting, making sick, and destroying the lives of all of said persons, and spreading the aforesaid infection and disease through the entire community; to the common nuisance of all the people, against the peace, &c.[4]

[1] I have enlarged this form a little beyond the precedents in some particulars, and slightly varied it in others, to free it from what is too obviously surplusage, and render it more certainly adequate. See, for precedents, 3 Chit. Crim. Law, 651; 4 Went. Pl. 225; Rex *v.* Pedly, 1 A. & E. 822; The State *v.* Purse, 4 McCord, 472.

[2] For precedents, see The State *v.* Payson, 37 Maine, 361; The State *v.* Kaster, 35 Iowa, 221; 3 Chit. Crim. Law, 647; Commonwealth *v.* Van Sickle, Brightly, 69.

[3] For example, see forms in Cornell *v.* The State, 7 Baxter, 520; Commonwealth *v.* Sweeney, 131 Mass. 579; 4 Went. Pl. 215–219. By putting night-soil in the street, 3 Chit. Crim. Law, 622. Killing cattle and leaving their skins or carcasses to corrupt the air, 3 Chit. Crim. Law, 629, 647. Keeping pack of hounds and placing carrion near the highway, 3 Chit. Crim. Law, 643; 4 Went. Pl. 213. Deleterious smoke and vapors, 6 Cox C. C. App. 76.

[4] The precedents overflow with obviously useless words while omitting something of what is perhaps essential. So the

§ 815. **Glandered Horse.** — Similar to the foregoing is the indictment for taking into the public ways a horse affected with the glanders or other disease communicable to man. No separate form for it is required.[1]

§ 816. **Stagnant Water.** — By a statute, "corrupting or rendering unwholesome or impure the waters of any river, stream, or pond" was declared to be a nuisance. Thereon an indictment substantially in the following terms was held to be good, and it is believed to satisfy also the common law: —

That A, &c. on, &c. at, &c. being possessed of a certain mill-dam, mill-pond, and mill, with their appurtenances, situate near and adjacent to a common highway and the dwelling-houses of divers persons, did then and thence continually until the day of the finding of this indictment [ante, § 81–84] there unlawfully and injuriously cause and permit the waters of said mill-pond to overflow the adjacent lands, as well the lands of other persons as his own; by means whereof the water of said mill-pond was rendered impure, corrupted, and unwholesome, and the lands overflowed as aforesaid were rendered and kept marshy and filled with noxious weeds and putrid vegetation, and corrupted, impure, and unwholesome water, whereby the air in and along said common highway, and in and around said dwelling-houses, and over and for a long distance around said mill-pond, became and was corrupted, infected, offensive, and unwholesome; to the common nuisance of all the people, against the peace, &c.[2]

XII. *Liquor and Tippling Shops.*[3]

§ 817. **At Common Law.** — A tippling-shop is indictable at the common law only when and because it is a disorderly house.[4] And so the forms under the sub-titles "Bawdy-house," "Disorderly House," and "Gaming-house" are serviceable under this sub-title. No good would come from setting down here separate

above form departs considerably from them. See, for precedents, 2 Chit. Crim. Law, 553; 4 Went. Pl. 353; Rex *v.* Vantandillo, 4 M. & S. 73; Rex *v.* Burnett, 4 M. & S. 272. Against an apothecary for keeping a common inoculating house near the church in a town, 3 Chit. Crim. Law, 656. Against a surgeon for causing children to be brought through public streets, infected with contagious disorder, 2 Chit. Crim. Law, 555.

[1] For precedents, see 6 Cox C. C. App. 77; Reg. *v.* Henson, Dears. 24.

[2] The State *v.* Close, 35 Iowa, 570. For like forms, see Stephen *v.* Commonwealth, 2 Leigh, 759; Munson *v.* People, 5 Parker C. C. 16; Barring *v.* Commonwealth, 2 Duv. 95. Damming stream, and so making the air unwholesome, The State *v.* Rankin, 3 S. C. 438.

[3] For the direct expositions of this offence, with the pleading, evidence, and practice, see Crim. Law, I. § 1113–1118; Stat. Crimes, § 1064–1070. Incidental, Crim. Law, I. § 318, 504, 505; Stat. Crimes, § 213, 984, 997, 1027.

[4] Crim. Law, I. § 1113; Stat. Crimes, § 984, 1064.

forms, which, in substance, would be mere repetitions of matter from the other sub-titles.[1] Still, —

§ 818. **As Repetitions of Offence.** — Under the principle that it is an indictable nuisance at the common law to keep a place for the common commission and repetition of petty offences,[2] if a statute has made the several unlicensed sales of liquor penal or punishable, it is believed to be an indictable common-law nuisance to keep a house or shop for such common selling. The author has before him no form for the allegations, but suggests the following: —

That A, &c. on, &c. [as at ante, § 80, *or*, adding the continuando as at ante, § 81–84, if the pleader chooses], at, &c. did unlawfully keep and maintain a common disorderly house [*or* shop, &c.], open to the public night and day [ante, § 782], wherein to commonly sell, and did commonly sell therein, intoxicating liquors to all persons willing to purchase the same, he the said A not having any authority or license therefor [*or*, &c. negativing the license as directed ante, § 642 and note, 649], and did then [*or* during all the time aforesaid] and there cause to come together and remain in said house [*or* shop] night and day great numbers of disorderly persons, buying of the said A intoxicating liquors, drinking the same there, and carrying the same away, in common violation of the laws; to the common nuisance of all the people, against the peace, &c.

§ 819. **Statute declaring Nuisance — (Lotteries).** — There is a third principle, which, as judicially observed, "has prevailed and been acted on without qualification, that, when the legislature declares an act to be a public nuisance, the person doing the act is indictable."[3] Therefore, after a statute was made pronouncing lotteries "common and public nuisances,"[4] allegations adjudged good were, in substance, —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment [ante, § 81–84], at, &c. did unlawfully set up, conduct, and maintain a certain lottery not authorized by law, wherein were prizes awarded to the subscribers thereto for whom certain numbers were drawn; to the common nuisance of all the people [ante, § 775], against the peace, &c.[5]

§ 820. **Common Statute and Form thereon.** — The statutes creating the offence of liquor nuisance are in differing terms.[6] A

[1] And see the form, and note to it, in 3 Chit. Crim. Law, 671. Also, the precedent in Cable *v.* The State, 8 Blackf. 531.

[2] Crim. Law, I. § 1119–1121.

[3] Erle, C. J. in Reg. *v.* Crawshaw, Bell C. C. 303, 316, 8 Cox C. C. 375. Refers to Rex *v.* Gregory, 5 B. & Ad. 555.

[4] 10 & 11 Will. 3, c. 17, § 1.

[5] Reg. *v.* Crawshaw, supra.

[6] Stat. Crimes, § 1064–1070.

representative one is, that "all buildings, places, or tenements resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal keeping or sale of intoxicating liquor, shall be deemed common nuisances," punishable in a way pointed out.[1] The allegations on this may be, —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment [ante, § 81–84], at, &c. did unlawfully keep and maintain a certain building[2] [*or* place, *or* tenement[3]] there during all said time[4] used for the illegal keeping and illegal sale of intoxicating liquor; to the common nuisance of all the people [ante, § 775], against the peace, &c.[5]

[1] Mass. Pub. Stats. c. 101, § 6, 7.

[2] The expression here, in the forms in Commonwealth *v.* Kelly, 12 Gray, 175, and various other cases, is "a certain common nuisance, to wit, a building." This circumlocution is palpably needless. The statute declares the building to be a nuisance; hence, in matter of law, it is such. But no matter of law need be alleged. Ante, § 734 and note and places there referred to.

[3] I see no great objection to saying here, if the pleader chooses, "building, place, and tenement;" for a building is a place, and so is a tenement, and probably a tenement is a building. But if the proofs should disclose simply a stand in the outer air, could there be a conviction on this form of the allegation? Ante, § 666, note.

[4] The repetition of time and place here has been adjudged unnecessary. The State *v.* Hopkins, 5 R. I. 53; Commonwealth *v.* Langley, 14 Gray, 21. I often, in these forms, make this repetition where I do not deem it absolutely essential, as a suggestion to the pleader for avoiding a possible question at the trial or afterward.

[5] Commonwealth *v.* Kelly, supra, and other cases cited under "Massachusetts" in this note. For precedents under the various statutes, see —

Connecticut. — The State *v.* Thomas, 47 Conn. 546.

Georgia. — Warner *v.* The State, 51 Ga. 426.

Indiana. — Cable *v.* The State, 8 Blackf. 531; The State *v.* Zimmerman, 2 Ind. 565; Huber *v.* The State, 25 Ind. 175; Farrell *v.* The State, 38 Ind. 136, 137; Leary *v.* The State, 39 Ind. 544; Joseph *v.* The State, 42 Ind. 370; McLaughlin *v.* The State, 45 Ind. 338; Davis *v.* The State, 52 Ind. 488; Collins *v.* The State, 58 Ind. 5; Douglass *v.* The State, 72 Ind. 385.

Iowa. — The State *v.* Schilling, 14 Iowa, 455; The State *v.* Baughman, 20 Iowa, 497; The State *v.* Freeman, 27 Iowa, 333; The State *v.* Harris, 27 Iowa, 429; The State *v.* Stapp, 29 Iowa, 551; The State *v.* Allen, 32 Iowa, 248; The State *v.* Jordan, 39 Iowa, 387; The State *v.* Reininghaus, 43 Iowa, 149.

Kansas. — The State *v.* Teissedre, 30 Kan. 476, 480; The State *v.* Nickerson, 30 Kan. 545, 547.

Kentucky. — Morrison *v.* Commonwealth, 7 Dana, 218; Overshiner *v.* Commonwealth, 2 B. Monr. 344.

Maine. — The State *v.* Collins, 48 Maine, 217; The State *v.* Ruby, 68 Maine, 543.

Massachusetts. — Commonwealth *v.* Kimball, 7 Gray, 328; Commonwealth *v.* Hoye, 9 Gray, 292; Commonwealth *v.* Buxton, 10 Gray, 9; Commonwealth *v.* Skelley, 10 Gray, 464; Commonwealth *v.* Kelly, 12 Gray, 175; Commonwealth *v.* Quin, 12 Gray, 178; Commonwealth *v.* Barnes, 13 Gray, 26; Commonwealth *v.* Howe, 13 Gray, 26; Commonwealth *v.* Langley, 14 Gray, 21; Commonwealth *v.* Hill, 14 Gray, 24; Commonwealth *v.* Taylor, 14 Gray, 26; Commonwealth *v.* Donovan, 16 Gray, 18; Commonwealth *v.* Welsh, 1 Allen, 1; Commonwealth *v.* Gallagher, 1 Allen, 592; Commonwealth *v.* Walton, 11 Allen, 238; Commonwealth *v.* Greenen, 11 Allen, 241; Commonwealth *v.* Blake, 12 Allen, 188; Commonwealth *v.* Wright, 12 Allen, 190; Commonwealth *v.* Smith, 102 Mass. 144; Commonwealth *v.* Bennett, 108 Mass. 27; Commonwealth *v.* Martin, 108 Mass. 29, note; Common-

§ 821. **Adding other Elements.** — The statute just quoted is very suggestive of the propriety of adding, in the allegations, other elements of nuisance to this one, if so are the facts.[1] Thus, —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment, at, &c. did unlawfully keep and maintain a certain building [see last form] [2] used as a house of ill-fame resorted to for prostitution and lewdness, and for illegal gaming, and used for the illegal sale and illegal keeping of intoxicating liquor; [3] to the common nuisance of all the people, against the peace, &c.[4]

§ 822. **Another.** — Under the Iowa provisions it has been adjudged good simply to allege, —

That A, &c. on, &c. at, &c. "did keep a certain house in which he then and there kept for sale and sold intoxicating liquors" [adding the proper conclusion].[5]

XIII. *Making Self a Nuisance.*

§ 823. **Elsewhere.** — Nearly all that would be appropriate here is given in other connections; as, under the title "Drunkenness," the nuisance of being a common drunkard; [6] under "Adultery," &c. open lewdness and connected offences.[7] Further on, the title "Vagrancy," &c. will include various personal nuisances. And "Barratry," "Common Scold," "Eavesdropping," and "Exposure of Person" constitute separate sub-titles in this chapter.

wealth *v.* Dunn, 111 Mass. 425, 426; Commonwealth *v.* Shea, 115 Mass. 102; Commonwealth *v.* Campbell, 116 Mass. 32; Commonwealth *v.* McIvor, 117 Mass. 118; Commonwealth *v.* Costello, 118 Mass. 454; Commonwealth *v.* Ballou, 124 Mass. 26; Commonwealth *v.* Kahlmeyer, 124 Mass. 322; Commonwealth *v.* Fraher, 126 Mass. 56; Commonwealth *v.* Ronan, 126 Mass. 59; Commonwealth *v.* Roberts, 132 Mass. 267.

Missouri. — Neales *v.* The State, 10 Misso. 498.

Rhode Island. — The State *v.* Hopkins, 5 R. I. 53; Plastridge *v.* The State, 6 R. I. 76; The State *v.* Tracey, 12 R. I. 216.

Vermont. — The State *v.* Paige, 50 Vt. 445; The State *v.* Haley, 52 Vt. 476.

[1] Ante, § 776 and note, 780.

[2] Not necessary to repeat time and place here. Ante, § 820 and note.

[3] The form in Commonwealth *v.* Donovan, 16 Gray, 18, proceeds here: "Whereby, and by force of the statute in such case made and provided, the said building, place, and tenement, then and there kept and maintained by the said A, and then and there used and resorted to as aforesaid, was then and there a common nuisance." Needless. Ante, § 820, note.

[4] Commonwealth *v.* Donovan, supra; Commonwealth *v.* Langley, 14 Gray, 21; Commonwealth *v.* Hill, 14 Gray, 24; Commonwealth *v.* Taylor, 14 Gray 26; Commonwealth *v.* Kimball, 7 Gray, 328; The State *v.* Tracey, 12 R. I. 216.

[5] The State *v.* Jordan, 39 Iowa, 387. And compare with the somewhat fuller allegations in The State *v.* Freeman, 27 Iowa, 333; The State *v.* Allen, 32 Iowa, 248; The State *v.* Baughman, 20 Iowa, 497.

[6] Ante, § 373–376.

[7] Ante, § 156–158.

§ 824. **Prostitute.** — Not at common law,[1] but under some statutes, it is punishable criminally to be a common prostitute.[2]

§ 825. **Railer and Brawler.** — Under a statute making it punishable to be a "common railer and brawler," it was adjudged adequate to allege, in general terms, —

That A, &c. on, &c. [*adding* the continuando or not, as the pleader chooses, ante, § 81–84], at, &c. was a common railer and brawler [in evil example to others in like case to offend[3]]; to the common nuisance, &c. [ante, § 775], against the peace, &c.[4]

§ 826. **Brawl and Tumult.** — A statute forbidding any person to "make any brawls or tumults in any street, lane, alley, or public place," appears to be sufficiently covered by the allegations, —

That A, &c. on, &c. at, &c. did make a great noise, brawl, and tumult in a certain public street there [concluding as above].[5]

XIV. *Noxious and Offensive Trades and Business.*[6]

§ 827. **Connected with other Sub-titles.** — The nuisance under this sub-title consists of corrupting the air, creating annoying noises, or presenting to the sight what should not be publicly exhibited, or all combined; so that, neither in its nature nor in the allegations, is there much reason, apart from the custom of the books, for giving it a separate consideration.

§ 828. **Form in General.** — The allegations may be, —

That A, &c. on, &c. [*adding* the continuando or not, as the pleader chooses], at, &c. [*adding* so much in particularization of the locality as will show it to be public, to the extent of rendering the commission of the offence there legally possible], did unlawfully, &c. [setting out the defend-

[1] Crim. Law, I. § 1085.

[2] For a form for the allegations, see Delano *v.* The State, 66 Ind. 348. And for a similar offence, Commonwealth *v.* Norton, 13 Allen, 550. As to the offence, consult Stat. Crimes, § 641, 646, 652.

[3] In the form before me, but not necessary. Ante, § 48.

[4] Stratton *v.* Commonwealth, 10 Met. 217. As to the sufficiency of this general form of allegation, see Crim. Proced. I. § 493, 494; II. § 200.

[5] The State *v.* Perkins, 42 N. H. 464. The question under this statute seems not quite the same as that under the one quoted in the last section. And the form in the text adds the words "a great noise" to the statutory expression. It is, at least, safe for the pleader to expand the allegations here beyond the words in the statute.

[6] For the direct elucidations of this offence, with the pleading, evidence, and practice, see Crim. Law, I. § 1138–1144; Crim. Proced. II. § 875–877. Incidental, Crim. Law, I. § 490, 491, 531; Stat. Crimes, § 20, 156, note, 208, note.

ant's acts, and their effect in creating the particular nuisance]; to the common nuisance of all the people [ante, § 775], against the peace, &c. [ante, § 777].[1]

§ 829. **Common Form — (Tripe boiling, &c.).** — A form from the current English books, by slight variations adapted to our use, is, —

That A, &c. on, &c. [as in the last form], at, &c. near unto divers common highways, and near unto the dwelling-houses of divers people, there situate and being, unlawfully and injuriously did make, erect, and set up [and did cause and procure to be made, erected, and set up [2]] [*or*, did, after the erecting, making, and setting up by persons to the jurors unknown, unlawfully and injuriously continue [3]] a certain furnace and boiler, for the purpose of boiling tripe and other entrails and offal of beasts; and did there, during all the time aforesaid [*or*, if the continuando is not used, and perhaps if it is, ante, § 84, did then and there] unlawfully and injuriously boil, in the said boiler, divers large quantities of tripe and other entrails and offal of beasts; by reason of which said premises, divers noisome, offensive, and unwholesome smokes, smells, and stenches, during the time aforesaid, were thence emitted and issued, so that the air then and there was and yet is greatly filled and impregnated with the said smokes, smells, and stenches, and was and is rendered and become corrupted, offensive, uncomfortable, and unwholesome; to the common nuisance of all the people [ante, § 775], against the peace, &c.[4]

[1] For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 955; 3 Chit. Crim. Law, 629, 647–657, 663, 664, 721; 6 Went. Pl. 417; 6 Cox C. C. App. 76, 77; Rex *v.* Brooks, Trem. P. C. 195; Rex *v.* Cole, Trem. P. C. 198; Rex *v.* White, 1 Bur. 333; Rex *v.* Dewsnap, 16 East, 194; Reg. *v.* Mutters, Leigh & C. 491, 10 Cox C. C. 6.

Indiana. — Ellis *v.* The State, 7 Blackf. 534; Moses *v.* The State, 58 Ind. 185.

Maine. — The State *v.* Hart, 34 Maine, 36.

Maryland. — Clayton *v.* The State, 60 Md. 272.

Massachusetts. — Commonwealth *v.* Brown, 13 Met. 365; Commonwealth *v.* Rumford Chemical Works, 16 Gray, 231.

New Hampshire. — The State *v.* Wilson, 43 N. H. 415.

New Jersey. — The State *v.* Society for Useful Manufactures, 13 Vroom, 504, 505.

New York. — People *v.* Cunningham, 1 Denio, 524; Taylor *v.* People, 6 Parker C. C. 347.

Wisconsin. — Taylor *v.* The State, 35 Wis. 298.

[2] Not necessary. Ante, § 139 and note and places there referred to, 620, 621, 630.

[3] In the form before me, matter the equivalent of this in brackets is introduced into a separate count. I can discover no possible advantage in two counts. Certainly both the erection and the continuance of a nuisance may be charged in one. Crim. Proced. II. § 866. And proof of either will justify a conviction. Nor, as a continuance constitutes a complete offence, can any allusion to the erection, or by whom, be necessary where it only is to be proved. If, then, the pleader doubts how the evidence will be, he may simply say, in his one count, —

Did unlawfully erect, maintain, and continue to use, &c. [*or*, in any other appropriate words to this effect].

[4] Archb. Crim. Pl. & Ev. 10th ed. 633, 634, 19th ed. 955.

§ 830. **On Statute.** — Variations, where the indictment is on a statute, may be permitted or required, so as to cover the statutory terms. Thus, on a provision to punish one who "shall erect, maintain, or keep a slaughter-house, or use any building heretofore erected, for the purposes of a slaughter-house, within the limits of any village of not less than one hundred inhabitants, or within one-eighth of one mile from any dwelling-house or building used as a place of business," the averments may be, —

That A, &c. on, &c. at, &c. did unlawfully use for the purpose of a slaughter-house a certain building theretofore erected, and then and there being, within one-eighth of one mile from certain and sundry dwelling-houses then used and occupied as such; and in said building did then and there slaughter [great numbers of beef-cattle, hogs, sheep, and other animals [1]]; to the, &c. [concluding as in other cases].[2]

§ 831. **Other Forms** — may be readily constructed, in analogy to the foregoing, to cover the facts of particular cases, or special statutory terms.[3]

XV. *Offensive and Hurtful Noises.*[4]

§ 832. **Howling Dogs.** — Adapting to our use an English common-law form, we have, —

That A, &c. on, &c. [*adding*, if the pleader chooses, the continuando, ante, § 81–84], at, &c. adjoining and near unto divers common highways there, whereon were many people constantly being and passing, and near unto many dwelling-houses inhabited and occupied by multitudes of people, did unlawfully keep and cause to remain night and day great numbers of

[1] Not in the form before me, but probably most pleaders would choose to add something of this sort.

[2] Taylor *v.* The State, 35 Wis. 298, considerably changed in the expression.

[3] **Slaughter-house.** — 3 Chit. Crim. Law, 647, 648, 721; Taylor *v.* People, 6 Parker C. C. 347; The State *v.* Wilson, 43 N. H. 415; Moses *v.* The State, 58 Ind. 185.

Soap Manufactory. — 3 Chit. Crim. Law, 655; Rex *v.* Cole, Trem. P. C. 198.

Bone Factory. — Clayton *v.* The State, 60 Md. 272.

Distillery. — People *v.* Cunningham, 1 Denio, 524.

Steam-engine. — Rex *v.* Dewsnap, 16 East, 194.

Boiling, — various sorts of offensive. 3 Chit. Crim. Law, 649, 652; 6 Went. Pl. 417; Rex *v.* White, 1 Bur. 333; Commonwealth *v.* Brown, 13 Met. 365.

Quarrying Stone — near highway and dwelling-houses. Reg. *v.* Mutters, Leigh & C. 491, 10 Cox C. C. 6.

Glass-house. — Rex *v.* Brooks, Trem. P. C. 195.

Brazier. — 3 Chit. Crim. Law, 664.

Coppersmith's Shop. — 3 Chit. Crim. Law, 663.

Making Hartshorn. — 3 Chit. Crim. Law, 653.

[4] Crim. Law, I. § 531, 537, 1078, 1115, 1136, 1138; II. § 1273; Crim. Proced. II. § 280, 874 *b*.

dogs and bitches accustomed, as he the said A there during all said time well knew,[1] to making great and offensive howlings and other disturbing noises; and there, during all said time, in the night as well as in the day, and during the natural and proper hours for rest and sleep, did cause and permit the said dogs and bitches to make and keep up, and they did make and keep up, to the disturbance of all people there and for a long distance around being and dwelling, constant and continued howlings, loud yells, moans, and other offensive and disturbing noises; to the common nuisance of all the people, against the peace, &c.[2]

§ 833. **Defendant's own Noises.** — Or the allegations at the common law may be, —

That A, &c. on, &c. at, &c. did, in and near a certain common highway there, and near to divers dwelling-houses wherein were people abiding, utter, to the disturbance of multitudes of persons, loud exclamations and outcries, and thereby did then and there draw together great numbers of people; to the common nuisance of all the people, against the peace, &c.[3]

XVI. *Unwholesome Food and Water.*[4]

§ 834. **Distinguished.** — What we are considering here is the nuisance. It should not be confounded with the offence treated of in a preceding chapter.[5]

§ 835. **Forms** — for this offence are easily constructed on the foregoing models.[6] This chapter is already so long that its further extension is not deemed advisable.

[1] Not in the form before me, and perhaps not necessary, yet safer. Ante, § 789.

[2] 3 Chit. Crim. Law, 643, 647.

[3] Commonwealth *v.* Harris, 101 Mass. 29; Commonwealth *v.* Oaks, 113 Mass. 8; Commonwealth *v.* Smith, 6 Cush. 80; The State *v.* Baldwin, 1 Dev. & Bat. 195. And compare 3 Chit. Crim. Law, 1136 *b*; The State *v.* Riggs, 22 Vt. 321; The State *v.* Langford, 3 Hawks, 381; ante, § 707.

[4] Crim. Law, I. § 491, 558; Crim. Proced. I. § 524, note; II. § 868, 878.

[5] Ante, § 761 et seq.

[6] Rendering water unfit to drink, 6 Cox C. C. App. 76. Corrupting the waters of a river by conveying refuse gas into it, Rex *v.* Medley, 6 Car. & P. 292.

For OATH, UNLAWFUL, see post, § 853.
OBSCENE LIBEL, see LIBEL AND SLANDER.

CHAPTER LXIII.

OBSTRUCTING JUSTICE AND GOVERNMENT.[1]

§ 836. **Elsewhere.** — A large part of what would be appropriate here is placed under more specific titles; as, "Bribery," "Champerty and Maintenance," "Concealment of Birth," "Contempt of Court," "Duelling," "Election Offences," "Forcible Entry," "Fraudulent Conveyance," "Marriage," "Neutrality Laws," "Pension Laws," "Post-office Offences," "Prison Breach," &c., "Refusing Office," "Sedition," "Tax and other Revenue Laws," "Treason."

§ 837. **Here, and how divided.** — We shall in this chapter consider, I. Injuring, Resisting, or Hindering Official Person; II. Refusing to assist Officer; III. Usurping or Assuming Office; IV. Embracery; V. Other Obstructions.

I. *Injuring, Resisting, or Hindering Official Person.*

§ 838. **Formula for Indictment.** — How, in general, the allegations within this sub-title should be, is explained elsewhere.[2] With due particularization, a *prima facie* offence should be made to appear; and, if the indictment is on a statute, its terms should

[1] For the direct expositions of this offence, with the pleading, evidence, and practice, see Crim. Law, I. § 450–480 (extending over a wider field than this chapter); II. § 384–389, 1009–1013; Crim. Proced. II. § 344–347, 879–898. Incidental, Crim. Law, I. § 340, 587, 688, 695, 697, 868; II. § 39, 48–51, 222–224, 244–248, 252, 253, 255, 265–267, 699; Crim. Proced. I. § 160–162, 185, 193, 195, 198, 202–205, 647; Stat. Crimes, § 216, 223.

[2] Crim. Proced. II. § 881–890.

be covered. Hence the form will considerably vary with the case. The order of the allegations is immaterial. In substance, and in a general way, they may be, —

That on, &c. at, &c. [ante, § 80] X, being then and there a justice of the peace in and for said county [*or*, one of the constables of said town, *or*, &c. mentioning any other office in the like brief way [1]], was, &c. [saying, with due particularity, what official act he was performing, an averment not in every sort of case formally required [2]]; whereupon A, &c. [ante, § 74–77], well knowing the premises [an allegation, also, not always necessary [3]], did, &c. [setting out, with proper particularization, the wrongful act]; against the peace, &c. [ante, § 65–69].[4]

§ 839. **Assault and Battery.** — An assault and battery on an officer, or a simple assault on him, is an aggravated assault or assault and battery within explanations in a previous chapter.[5] The indictment must cover the statute, and it need not ordinarily

[1] Crim. Proced. II. § 884.

[2] Ib. § 885, 886.

[3] Ib. § 887.

[4] For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 742, 746–748; 2 Chit. Crim. Law, 99, 126, 127, 137, 144–148, 155, 157, 201–215; 3 Ib. 832, 916; 4 Went. Pl. 63, 310, 311, 314, 375–405, 428, 437; 6 Cox C. C. App. 29–40; Rex *v.* Lovelace, Trem. P. C. 273; Rex *v.* Brady, 1 B. & P. 187, 2 Leach, 4th ed. 803; Rex *v.* Osmer, 5 East, 304; Rex *v.* Gordon, 1 Leach, 4th ed. 515; Rex *v.* White, Russ. & Ry. 99; Rex *v.* Ford, Russ. & Ry. 329; Rex *v.* Hood, 1 Moody, 281; Rex *v.* Shadbolt, 5 Car. & P. 504.

Alabama. — Heath *v.* The State, 36 Ala. 273; Murphy *v.* The State, 55 Ala. 252; Jones *v.* The State, 60 Ala. 99.

Arkansas. — Oliver *v.* The State, 17 Ark. 508.

Connecticut. — The State *v.* Moore, 39 Conn. 244.

Indiana. — The State *v.* Tuell, 6 Blackf. 344.

Iowa. — The State *v.* Freeman, 8 Iowa, 428.

Maine. — The State *v.* Roberts, 26 Maine, 263; The State *v.* Dearborn, 54 Maine, 442.

Massachusetts. — Commonwealth *v.* Kennard, 8 Pick. 133; Commonwealth *v.* Hastings, 9 Met. 259; Commonwealth *v.* Kirby, 2 Cush. 577, 579; Commonwealth *v.* Tobin, 108 Mass. 426; Commonwealth *v.* Dueey, 126 Mass. 269.

Missouri. — The State *v.* Henderson, 15 Misso. 486.

New Hampshire. — The State *v.* Copp, 15 N. H. 212; The State *v.* Fifield, 18 N. H. 34; The State *v.* Richardson, 38 N. H. 208; The State *v.* Webster, 39 N. H. 96; The State *v.* Beasom, 40 N. H. 367; The State *v.* Flagg, 50 N. H. 321; The State *v.* Roberts, 52 N. H. 492.

New York. — People *v.* Holcomb, 3 Parker C. C. 656.

Pennsylvania. — Finn *v.* Commonwealth, 6 Barr, 460.

Rhode Island. — The State *v.* Maloney, 12 R. I. 251.

South Carolina. — The State *v.* Hailey, 2 Strob. 73.

Tennessee. — The State *v.* Maynard, 3 Baxter, 348.

Texas. — The State *v.* Bradley, 34 Texas, 95; The State *v.* Coffey, 41 Texas, 46; Horan *v.* The State, 7 Texas Ap 183, 184.

Vermont. — The State *v.* Lovett, 3 Vt. 110; The State *v.* Miller, 12 Vt. 437; The State *v.* Hooker, 17 Vt. 658; The State *v.* Burt, 25 Vt. 373; The State *v.* Carpenter, 54 Vt. 551, 552.

Wisconsin. — Rountree *v.* United States, 1 Pin. 59; The State *v.* Welch, 37 Wis. 196.

United States. — United States *v.* Bachelder, 2 Gallis. 15; United States *v.* Fears, 3 Woods, 510; United States *v.* Goure, 4 Cranch C. C. 488.

[5] Ante, § 211–226.

do more; as, for example, if by its terms the offence can be committed only when the officer is in the discharge of his duty, the fact that he was so must be alleged, otherwise it need not be. And the other statutory terms must be heeded in the allegations. For example, —

That A, &c. on, &c. at, &c. did make an assault on X, who was then and there one of the constables of the said town of N, while he the said X was in the lawful exercise and discharge of the duties of his said office [*or*, possibly some opinions will require it to be averred what X was doing, and so distinctly as to make his authority appear], knowing the said X then and there to be such constable so in the lawful exercise and discharge of his office and duties; and him the said X being such officer and so as aforesaid employed, did then and there beat, bruise, wound, and ill-treat; against the peace, &c.[1]

§ 840. **Resisting and Obstructing Officer.** — What is said in the last section applies equally to the subject of this. Moreover, as to this, the precedents in the books differ, the decisions upon the requirements under the common-law rules are not harmonious, and the statutes simplifying those rules differ in our respective States. The indictment is commonly or always upon a statute; and, if the statutory terms are covered in a reasonable particularization of the facts of the individual instance, the strictest requirements of the common law would seem, in principle, to be satisfied. For example, —

That A, &c. on, &c. at N in the county of M, while X, a deputy sheriff of said county, was at said N lawfully and by virtue of his said office proceeding under an execution in due form to levy on and seize two horses the property of the said A, did unlawfully collect together a body of servants and men, to the number of twelve and more, and by the superior

[1] Very many of the forms and precedents referred to in the last section are of this sort; as, for example, Commonwealth *v.* Hastings, 9 Met. 259; Commonwealth *v.* Kennard, 8 Pick. 133; Commonwealth *v.* Ducey, 126 Mass. 269; Commonwealth *v.* Kirby, 2 Cush. 577, 579; Commonwealth *v.* Tobin, 108 Mass. 426; The State *v.* Roberts, 26 Maine, 263; The State *v.* Dearborn, 54 Maine, 442; People *v.* Holcomb, 3 Parker C. C. 656; The State *v.* Bradley, 34 Texas, 95; The State *v.* Coffey, 41 Texas, 46; The State *v.* Hooker, 17 Vt. 658; Rountree *v.* United States, 1 Pin. 59; 6 Cox C. C. App. 29–31, 36; 2 Chit. Crim. Law, 127, 146; 3 Ib. 832. Assaulting privy councillor in the execution of his office, 2 Chit. Crim Law, 99. Officers of customs and excise, 2 Chit. Crim. Law, 137, 138; 4 Went. Pl. 310, 387, 392, 394; 6 Cox C. C. App. 30; Rex *v.* Brady, 1 B. & P. 187, 2 Leach, 4th ed. 803. To prevent arrest or detention, 2 Chit. Crim. Law, 146; 6 Cox C. C. App. 32–34; Rex *v.* Shadbolt, 5 Car. & P. 504; Rex *v.* Hood, 1 Moody, 281; Rex *v.* Ford, Russ. & Ry. 329; Rex *v.* Osmer, 5 East, 304. Assault and rescuing goods, 2 Chit. Crim. Law, 201, 202; 4 Went. Pl. 314.

force thereof did drive and compel to go away the said X, and did remove out of the said county the said horses ; against the peace, &c.[1]

§ 841. **Another, with Statute.** — Under the statutory words "forcibly resist, prevent, or impede any officers of the customs, &c. in the execution of their office," the substance of allegations adjudged good is, —

That A, &c. on, &c. at, &c. did forcibly and unlawfully resist, prevent, and impede X, who was then and there an officer and inspector of the customs with authority to seize all goods imported into the district of, &c. contrary to law, in the execution of his said office, in this, that, whereas the said X was then and there lawfully holding in his possession awaiting trial, having theretofore by virtue of his said office lawfully seized, a certain trunk containing nineteen dozen of cotton hose, of the value, &c. as having been imported into the said district contrary to law, he the said A did then and there forcibly and unlawfully take and wrest from the said X, and carry away from his custody and out of his possession, the said trunk and the said merchandise therein contained ; against the peace, &c.[2]

§ 842. **Briefer.** — In Tennessee it has been adjudged good to aver, —

That A, &c. on, &c. at, &c. knowingly and wilfully resisted one X, a deputy sheriff, in attempting to serve and in serving a legal process, to wit, a civil warrant, on the said A ; against the peace, &c.[3]

[1] It was said in one case, that "the indictment must show what the process was, that it was legal, and in the hands of a proper officer, and the mode of obstruction." Wardlaw, J. in The State *v.* Hailey, 2 Strob. 73, 76. And in another case a learned judge observed, that "an indictment for obstructing the execution of a search-warrant must show the warrant to be legal, and it must therefore show that the warrant appeared upon its face to be founded on a sufficient affidavit." Blackford, J. in The State *v.* Tuell, 6 Blackf. 344, 345. Again, it seems to have been deemed necessary so to describe the process resisted that its lawfulness will appear. The State *v.* Flagg, 50 N. H. 321. This brings us back in some measure to questions considered in an early chapter of the present volume. Ante, § 91–97. Undoubtedly the fact that the officer was proceeding in due form of law should in some way appear in averment. But established principles will permit the pleader, at his election, either to say he was, or to set out facts from which the court can see as of law that he was. Crim. Proced. II. § 884–886, 888, 890, 905, 910 *a*, 911. There is no one analogy in the law of criminal pleading from which the setting out at large of the process would be required, though it is often done. For various forms, see The State *v.* Moore, 39 Conn. 224 ; United States *v.* Goure, 4 Cranch C. C. 488 ; Horan *v.* The State, 7 Texas Ap. 183, 184 ; The State *v.* Lovett, 3 Vt. 110 ; The State *v.* Miller, 12 Vt. 437 ; The State *v.* Carpenter, 54 Vt. 551, 552 ; The State *v.* Welch, 37 Wis. 196 ; The State *v.* Beasom, 40 N. H. 367 ; The State *v.* Henderson, 15 Misso. 486 ; The State *v.* Copp, 15 N. H. 212 ; The State *v.* Fifield, 18 N. H. 34 ; The State *v.* Freeman, 8 Iowa, 428 ; Finn *v.* Commonwealth, 6 Barr, 460 ; Rex *v.* Lovelace, Trem. P. C. 273 ; Rex *v.* White, Russ. & Ry. 99. Those who wish to examine the English books of precedents will find the references ante, § 838, sufficiently available.

[2] United States *v.* Bachelder, 2 Gallis. 15.

[3] The State *v.* Maynard, 3 Baxter,

§ 843. **As to which — Another.** — Doubtless not all of our courts will accept this form as sufficient. One sustained in Arkansas may come nearer satisfying objectors; namely, —

That A, &c. on, &c. at, &c. did knowingly and wilfully resist X, who was then and there a constable of N township in said county, in the attempt to execute a certain execution issued by O, esquire, an acting justice of the peace within and for the township and county aforesaid, in favor of Y against Z; against the peace, &c.[1]

II. *Refusing to assist Officer.*[2]

§ 844. **In General.** — How in general the indictment should be we saw in another connection.[3] The precedents differ considerably, and perhaps the decisions are not quite uniform, as to the degree of minuteness necessary in setting out the authority of the officer.[4]

§ 845. **To detain Prisoner.** — Following, in spirit and in substance, an English form which was sustained, and adhering to the legal reasons which govern this sort of allegation,[5] we may deem it adequate, where the offence is at the common law, to aver, —

That on, &c. at, &c. X, a constable of the said town of, &c. had the lawful custody of one Y whom he the said X had theretofore then and there duly arrested on a charge of felony, and after the said arrest the said Y then and there made an assault on the said X, attempting thereby, and employing other means, to escape from said lawful custody; whereupon the said X then and there called upon and commanded A, &c. [the defendant], having reasonable necessity for so doing, to assist him the said X in repelling the said assault, and in detaining the said Y, and preventing his escape; but the said A, well knowing the premises, did then and there unlawfully and wilfully neglect and refuse to obey the said call and command, and to assist the said X in repelling said assault and preventing said escape; against the peace, &c.[6]

348. A similar form is good in Alabama. Heath *v.* The State, 36 Ala. 273.

[1] Oliver *v.* The State, 17 Ark. 508. A form not very dissimilar was sustained in The State *v.* Burt, 25 Vt. 373.

[2] Crim. Law, I. § 464, 469; Crim. Proced. I. § 185; II. § 896.

[3] Crim. Proced. II. § 896.

[4] Compare Reg. *v.* Sherlock, Law Rep. 1 C. C. 20, 10 Cox C. C. 170, with The State *v.* Shaw, 3 Ire. 20.

[5] Ante, § 840 and note.

[6] Reg. *v.* Sherlock, Law Rep. 1 C. C. 20, 10 Cox C. C. 170. If the pleader, on comparing this form with such cases as The State *v.* Shaw, 3 Ire. 20, deems it weak on the point of the officer's authority, he can strengthen it as the particular facts may suggest. And see, as to this, the allegations in 2 Chit. Crim. Law, 151.

§ 846. **To arrest One.** — Where the offence consists of a refusal to assist an officer in making an original arrest, there may be reasons to indicate a fuller setting out of his authority. If so, still the indictment need not be so minute as to contain a copy of the judicial process on which he was proceeding. General description will suffice.[1]

§ 847. **To suppress Riot.**[2] — Stripping an English precedent of a part of its useless verbiage, and in a measure adapting it to American use, we have, —

That on, &c. at, &c. divers disorderly persons to the number of twenty and more, to the jurors unknown, did unlawfully, riotously, and routously assemble to disturb the public peace, and, being so assembled, did then and there for a long space of time, in breach of the public peace, continually commit divers riotous, routous, and turbulent outrages and offences, to the terror of many and all persons then and there inhabiting, passing, and being; whereupon one X, a constable of said town, did then and there in the discharge of his said office undertake and endeavor to prevent and restrain said assembled persons from further committing said outrages and offences, and to suppress said riot, but the said assembled persons did thereon then and there forcibly resist him therein and in discharging the duties of his said office; upon which the said X did then and there officially and in his own proper person call upon and require A, &c. [the defendant], then and there to aid and assist him the said X therein, in preserving the peace, and in arresting the said assembled persons offending; yet he the said A, well knowing the said official character of the said X, and well knowing the other aforesaid premises, did then and there unlawfully and wilfully neglect and refuse so to do; against the peace, &c.[3]

III. *Usurping or Assuming Office.*[4]

§ 848. **Coroner.** — Abridging and slightly modifying a verbose precedent from one of the older books, yet omitting nothing which any person would be likely to deem material, we have, at the common law, —

That on, &c. at, &c. one M was slain and his dead body lay there unburied [*or*, set out any other facts rendering a coroner's inquest proper], and notice thereof was then and there duly given to X, one of the coroners

[1] Consult and compare the two forms in Comfort *v.* Commonwealth, 5 Whart. 437; and The State *v.* Nail, 19 Ark. 563. It does not seem necessary to encumber the text with them.

[2] As to the duty of officers and others herein, see Crim. Proced. I. § 166, 183, 185, 186.

[3] Reg. *v.* Brown, Car. & M. 314.

[4] Crim. Law, I. § 468 and note, 587; Crim. Proced. II. § 898.

in and for said county, that he might do in the premises what his office of coroner required;[1] whereupon A, &c. [the defendant], not being and knowing himself not to be a coroner in and for said county, and having and knowing himself to have no authority of law to act in the premises [but being a person illiterate and entirely unfit, &c.[2]], did then and there maliciously, corruptly, and with intent to prevent the lawful taking of any coroner's inquisition upon view of the said dead body, usurp the office of coroner in and for said county, and take upon himself to execute those things which to the office of such coroner in the premises aforesaid belonged. And thereupon he the said A did then and there, suddenly after the aforesaid death of the said M, subtly, unduly, and unlawfully cause and procure sixteen several persons upon the view of the said dead body then and there to take their several oaths, as the custom is, before the said A, &c. [proceeding to set out briefly what was done], whereby the said dead body was removed and buried; so that neither the said X nor any other coroner in and for said county could or can inquire in due manner upon the view of the said dead body within said county according to law, nor was any inquisition ever had as to how or by what means the said M came to his death; against the peace, &c.[3]

§ 849. **Sheriff — (On Statute).** — On a statute making punishable one who "shall falsely assume or pretend to be a justice of the peace, sheriff, deputy sheriff, coroner, or constable, and shall take upon himself to act as such," &c. the averments may be, —

That A, &c. on, &c. at, &c. did falsely and unlawfully assume and pretend to be the sheriff of said county of M,[4] and did then and there take

[1] I retain this averment of notice to the true coroner because in the form before me. But its necessity is, at least, doubtful.

[2] In the form before me; but certainly mere surplusage, for illiteracy would not have debarred him from acting had he been coroner.

[3] Rex *v.* Voysey, Trem. P. C. 238. Probably some of these latter allegations are unnecessary, but the authorities are too few to enable one to draw with absolute certainty the partition line between the needful and the needless. Compare with the forms in Reg *v.* Buchanan, 8 Q. B. 883, for acting as attorney without being enrolled and qualified in manner required by statute; and Wayman *v.* Commonwealth, 14 Bush, 466, 469, for usurping the office of judge of elections. For a form of indictment against a township for burying a body without notice to the coroner, see 2 Chit. Crim. Law, 256. Usurping office of justice of peace, Rex *v.* Wakeman, Trem. P. C. 179.

[4] In the form before me, the words here are "did falsely assume and pretend to be a sheriff;" and the proof was, that the defendant pretended to be a sheriff from another State. The court interpreted the statute to require the pretence to be, that he was a sheriff of this State, which, therefore, should be alleged; and so arrested judgment. If this was all the statute meant, I should say the form before the court would suffice; because the meaning of the allegation is, not that the defendant said he was a sheriff of another State, but of this State. Crim. Proced. I. § 383; ante, § 644 and note. I interpret the statute, and herein I am sustained by the reasoning of the court, as requiring the pretence to be such as implies the authority to act in the locality in question, and to

upon himself to act as such sheriff [by then and there removing and carrying away from the custody and possession of one X, under the pretence of serving a writ of attachment upon his goods and chattels, a one-horse harness of him the said X]; against the peace, &c.[1]

IV. *Embracery.*[2]

§ 850. **Form, and how.** — The limits of this offence are not so well defined by authority as to render profitable an attempt to reduce the indictment to the fewest words. The following, from one of the older books, is slightly modified for use in our courts: —

That on, &c. at, &c. a certain issue in a plea of trespass on the case having been joined between X as plaintiff and Y as defendant, in the court of, &c. was therein pending, and a certain jury of the said county was impanelled and returned to try the same; whereupon A, &c. well knowing the premises, and being a common embracer of jurors, and devising and wickedly and unlawfully intending to hinder the due and lawful trial of the said issue by the jurors aforesaid impanelled and returned to try the said issue, did then and there, unlawfully, wickedly, and unjustly, on behalf of the said Y, defendant, solicit and persuade Z, who then and there was, and whom the said A then and there well knew to be, one of the jurors of the said jury impanelled and returned for the trial of the said issue, to appear and attend at the trial aforesaid upon the jury aforesaid in favor of the said Y; and then and there did say and utter to the said Z, one of the jurors aforesaid, divers words and discourses by way of commendation, on behalf of the said Y, the defendant, and then and there did say and utter to the said Z divers words and discourses by way of dispraise of the said X, the plaintiff; and the said A then and there unlawfully and corruptly did move and desire the said Z to solicit and persuade the other jurors, impanelled and returned to try the said issue, to give a verdict for the said Y, the defendant in the said cause. [And the jurors of the said jury, sworn for the trial of the said issue, by reason of the speaking of the said words and discourses by way of commendation on the behalf of the said Y, the

this view I have shaped the allegation to conform, and it necessarily satisfies the requirement of the court.

[1] Commonwealth *v.* Wolcott, 10 Cush. 61. The indictment had two counts, one with matter similar to this in brackets, the other without it. There can be no occasion for more than one count. I should prefer, at least for caution, to retain this matter. It is of a sort which some judges, not all, would be likely to deem necessary as particularizing the transaction. **Other Precedents.** — For a form for acting under a false process from court contrary to a statute, Reg. *v.* Evans, Dears. & B. 236, 7 Cox C. C. 293. Delivering a paper falsely purporting to be a copy of a certain process, Reg. *v.* Castle, Dears. & B. 363, 7 Cox C. C. 375.

[2] Crim. Law, I. § 468; II. § 384–389; Crim. Proced. II § 344–347.

defendant, did give their verdict for the said Y, the defendant[1]]; against the peace, &c.[2]

§ 851. **Conspiracy in Nature of Embracery.** — Another old precedent is, in substance, —

That at a court of, &c. on, &c. at, &c. a certain issue in a plea of trespass on the case, between X, plaintiff, and A, defendant, was tried by a jury of the country; and before said trial, the said A, &c. B, &c. and C, &c. did, on, &c. at, &c. conspire, combine, and confederate together, by rewards and other ways and means, unlawfully to procure a verdict to be given for the defendant; and, to bring about the same, to cause and enable the said B and C, for divers sums of money paid them by the said A, to be sworn and serve as jurors for the trial of the said issue,[3] and give and procure to be rendered a verdict for the defendant. In pursuance of which unlawful agreement and confederation, the said B and C afterward, on the day and year first above mentioned, there, by unlawful ways and means, did procure themselves to be sworn as jurors in the trial of the said issue, and, together with the other jurors sworn to try the same, did give their verdict for the defendant; against the peace, &c.[4]

V. *Other Obstructions.*

§ 852. **Dissuading Witness.** — For the common-law offence of enticing or persuading a witness not to appear at the trial,[5] the allegations will vary with the special facts. They may, for example, be, —

That on, &c. at, &c. A, &c. having theretofore in due form of law entered into a recognizance before O, esquire, a justice of the peace in and for the said county of M, to appear and answer at the then next term of the Court of, &c. holden in and for said county, to a complaint charging him with having theretofore in said county, &c. [stating briefly the substance of the accusation], and X having in like manner entered into a recognizance before the said O, esquire, to appear at the said court as a witness in the said cause,[6] the said A, well knowing the premises, and contriving and intending to impede and obstruct the due course of justice

[1] There is no just ground for deeming this matter in brackets indispensable, while yet the pleader may choose to retain it if true in his particular case.

[2] Rex *v.* Brooks, Trem. P. C. 175.

[3] In the form before me, the expression here is, "to be sworn *de circumstantibus* for the trial of the said issue." I should hesitate to use this expression, on the ground that the court might hold the words "de circumstantibus" not so far incorporated into our legal language as to have become English, rendering the allegation ill. Crim. Proced. I. § 342, 345, 347.

[4] Rex *v.* Opie, 1 Saund. 300.

[5] Crim. Law, I. § 468, 695, 734; II. § 253, 264, 266; Crim. Proced. I. § 556; II. § 897.

[6] As to the sufficiency of the form thus far, see Crim. Proced. I. § 556; II. § 897.

therein, unlawfully and corruptly did entice, solicit, and endeavor to persuade[1] the said X to absent himself from the said court, and not to appear before the same to give evidence of what he knew concerning the said complaint and accusation; against the peace, &c.[2]

§ 853. **Unlawful Oath.** — A sort of obstruction of justice is the administering or taking of an extrajudicial or other unlawful oath. There are, in England, statutes making it punishable;[3] and perhaps, also, in some of our States. But this sort of prosecution so seldom occurs that it will suffice to refer to places where forms for the indictment may be found.[4]

§ 854. **Other Forms.** — The methods by which justice and the workings of government may be obstructed are numberless.[5] But the foregoing sections of this chapter, and the places referred to in it, will, directly or by analogy, furnish the pleader with all needed help.

[1] Ante, § 106, 116.

[2] The State *v.* Ames, 64 Maine, 386. **Other Solicitations.** — Against a surveyor of taxes for persuading a collector to secrete a part of the money, 2 Chit. Crim. Law, 139. Soliciting a custom-house officer to neglect his duty, Rex *v.* Everett, 8 B. & C. 114. Attempting to persuade men to enlist as soldiers in another State, Commonwealth *v.* Jacobs, 9 Allen, 274. Enticing soldiers to mutiny, Rex *v.* Fuller, 2 Leach, 4th ed. 790; 2 Chit. Crim. Law, 101. Obstructing, by seditious words and promises of indemnity, the execution of a warrant, 2 Chit. Crim. Law, 147.

[3] 1 Russ. Crimes, 5th Eng. ed. 284-291, 377; 3 Ib. 30, 106; Archb. Crim. Pl. & Ev. 19th ed. 840-845; Reg. *v.* Nott, 4 Q. B. 768; Rex *v.* Moors, 6 East, 419, note.

[4] Archb. Crim. Pl. & Ev. 19th ed. 842-844; 2 Chit. Crim. Law, 102; Rex *v.* Eadon, 31 Howell St. Tr. 1064; Reg. *v.* Nott, supra, Car. & M. 288; Rex *v.* Lovelass, 1 Moody & R. 349, 6 Car. & P. 596; Rex *v.* Ball, 6 Car. & P. 563; Rex *v.* Brodribb, 6 Car. & P. 571; Rex *v.* Noonan, Jebb, 108; Rex *v.* Adams, Jebb, 135.

[5] See, for example, forms for a conspiracy to release one from custody, and become bail under fictitious names, 3 Chit. Crim. Law, 1145. Maiming to prevent arrest, Rex *v.* Williams, 1 Moody, 387. Pulling down stocks, prison, &c. 2 Chit. Crim. Law, 207; Rex *v.* Guy, 6 Went. Pl. 401. Receiving money to help one to stolen goods, 2 Chit. Crim. Law, 218, 219. Feeding armed prowlers, Vaughn *v.* The State, 3 Coldw. 102. Not repairing jail, 3 Chit. Crim. Law, 668.

For OBSTRUCTING RIVER, see WAY.
OFFENSIVE SHOWS, see ante, § 798-801.
OFFENSIVE TRADES, see ante, § 827-831.
OFFICE, MISCONDUCT IN, see MALFEASANCE, &c.
OFFICE, REFUSING, see REFUSING OFFICE.
OMISSION, see NEGLECTS.
OPEN AND NOTORIOUS LEWDNESS, see ante, § 152-158.
ORAL SLANDER, see LIBEL AND SLANDER.

CHAPTER LXIV.

PEACE, BREACHES OF THE.[1]

§ 855. **Meaning — Elsewhere.** — The meaning of the term "breach of the peace" appears at the places cited in the note. It is variable, sometimes extending to include all indictable wrongs, but commonly less wide in signification. Therefore it is not employed as a separate title in the other volumes of this series. So, in this volume, most of the breaches of the peace are contemplated under their more specific names. It would be useless to enumerate them here.

§ 856. **Night-disturbance of Habitation.** — Various forms of charging a common-law offence of this sort have been adjudged adequate. Thus, —

That A, &c. [ante, § 74–77], on, &c. [ante, § 80] about the hour of ten in the night thereof [ante, § 87], at, &c. [ante, § 80], unlawfully, maliciously, and secretly did, with intent to disturb the public peace, break and enter the dwelling-house of X [there situate[2]], Y the wife of the said X being then and there in said dwelling-house pregnant with child; whereupon the said A did, in said dwelling-house, then and there greatly misbehave himself, and greatly frighten the said Y, to her grievous injury, by means whereof she did afterward, on, &c. at, &c. miscarry; against the peace, &c. [ante, § 65–69].[3]

§ 857. **Another.** — Said the court: "The breaking of windows in the night, while a family is in the house, is not a mere trespass upon property; but, being calculated in its nature to frighten and disturb the people within the house, it may be considered as an indirect attack upon the persons of the family, and is clearly a breach of the peace." Therefore allegations were held good, in substance, —

[1] For the law relating to this title, see Crim. Law, I. § 536, 537, 539, 550, 591, 734, 945; Crim. Proced. I. § 207, 229, 264 *n*, 557, 1312; Stat. Crimes, § 198, 1064, note.

[2] Doubtless not necessary. Ante, § 253.

[3] Commonwealth *v.* Taylor, 5 Binn. 277.

That A, &c. on, &c. in the night thereof, at, &c. did unlawfully, violently, and injuriously cast and throw stones upon and against the dwelling-house of X, while he the said X and sundry other persons of his family were in said dwelling-house; and two window-sashes and fifteen squares of glass, parcel of said dwelling-house, did, with a large stick of wood and with stones, the said X and said other persons being in said dwelling-house and greatly terrified thereby, unlawfully, violently, and injuriously break and destroy; against the peace, &c.[1]

§ 858. **Under Statute.** — A statute making punishable one who shall "disturb or break the public peace by tumultuous and offensive carriage, by threatening, quarrelling, challenging," &c. creates but a single offence of breaking the peace, and it may be committed in any or all of the ways thus pointed out. Yet as it does not completely define the offence, allegations simply in the statutory words are not sufficient; something must be added giving character to and individualizing the transaction.[2] Taking hints from averments held good, yet constructing a form nearly independently of them, we have, —

That A, &c. on, &c. at, &c. did disturb and break the public peace by tumultuous and offensive carriage, and in particular toward one X, whom in the presence of divers assembled people he then and there abused by foul oaths and opprobrious words, and assaulted, and beat [here is a full allegation on one clause of the statute, but if the pleader chooses he may proceed to another, thus], and by threatening with a loud voice to horsewhip Y the wife of the said X; against the peace, &c.[3]

§ 859. **Another.** — The Arkansas statute, in terms similar to those in some of the other States, declares punishable one who "shall make use of any profane, violent, abusive, or insulting language toward or about another person, in his presence or hearing, which language, in its common application, is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault." Whether particular words are so calculated the jury should decide under the facts of the individual case.[4] It is believed to be good to allege, —

That A, &c. on, &c. at, &c. did, in the presence and hearing of X, make use of and utter the following profane, violent, abusive, and insulting words

[1] The State *v.* Batchelder, 5 N. H. 549. Similar was the indictment which was adjudged good at the common law in The State *v.* Wilson, 3 Misso. 125. And compare with ante, § 445, 446, 707.

[2] The State *v.* Matthews, 42 Vt. 542.

[3] The State *v.* Hanley, 47 Vt. 290.

[4] The State *v.* Moser, 33 Ark. 140.

toward and about the said X; namely [here setting out the words, ante, § 632–635]; the same, in their common application, having been then and there calculated to arouse the said X to anger, to cause a breach of the peace, and cause the said X to assault the said A; against the peace, &c.[1]

§ 860. **Other Methods of Offending.** — It would not be easy to draw the outer limits of this offence at the common law; and, beyond doubt, there are many acts not set down in the books, yet within the reason of others held indictable, which an intelligent court might well be asked to pronounce within the condemnation of the unwritten law. And statutes are continually enlarging the bounds of this offence.[2]

§ 861. **False Alarm of Fire.** — One method of disturbing the peace, perhaps not within the reasons of the common law, is to make a false alarm of fire. Under a statute authorizing a conviction "for giving, or causing to be given, a false alarm by the fire-alarm telegraph in the city of Mobile, knowing the same to be such," it has been deemed not necessary that the bells should be actually rung in the regular manner, or the firemen deceived. Less will suffice.[3] It is believed that, under the common-law rules, the allegations on such a provision may be, —

That A, &c. on, &c. at, &c. did unlawfully ring and cause to be rung, by means of the fire-alarm telegraph of the city of M, bells denoting a fire in said city and creating an alarm thereof, whereas there was not then and there any such fire, and this, and that the said alarm was false, the said A then and there well knew; against the peace, &c.

[1] For more of this sort of statute and the indictment thereon, see Hearn *v.* The State, 34 Ark. 550; Ivey *v.* The State, 61 Ala. 58; Ex parte Kearny, 55 Cal. 212; Commonwealth *v.* Foster, 3 Met. Ky. 1; Commonwealth *v.* Hawkins, 11 Bush, 603; Henderson *v.* The State, 63 Ala. 193; The State *v.* Schlottman, 52 Misso. 164; ante, § 635, note.

[2] See, for disturbing the peace, the summary conviction in Rex *v.* Roberts, Trem. P. C. 332. Making a brawl and tumult, The State *v.* Rollins, 55 N. H. 101. Intimidating, alarming, and disturbing a person, Embry *v.* Commonwealth, 79 Ky. 439. See also The State *v.* Mills, 10 Vroom, 587.

[3] Koppersmith *v.* The State, 51 Ala. 6.

For PEDDLERS, see HAWKERS AND PEDDLERS.

CHAPTER LXV.

PENSION LAWS, OFFENCES AGAINST THE.

§ 862. **In General.** — The pension laws and their penalties occupy considerable space in the volumes of statutes of the United States. Important though they are, they do not often come within the cognizance of the criminal-law lawyer. Hence, and because a full exposition of the offences under them would occupy more space than can well be spared in this volume, —

§ 863. **How in this Chapter.** — The author will, in this chapter, simply direct attention to places in the reports where needed information on this subject may be found.

§ 864. **Withholding Pension.** — We have some judicial expositions of this statutory offence, and forms for the indictment.[1] Also, —

§ 865. **Fees.** — The taking, by pension agents, of extortionate fees.[2] Also, —

§ 866. **Forged Papers.** — The transmitting of forged papers to the pension office.[3] And, —

§ 867. **Fraudulent Claims.** — The presenting of fraudulent claims to pensions.[4] Moreover, —

§ 868. **Personating.** — Falsely personating a deceased soldier, to obtain a pension, is considered in some Irish cases.[5]

[1] United States *v.* Bennett, 12 Blatch. 345; United States *v.* Howard, 7 Bis. 56; United States *v.* Chaffee, 4 Ben. 330.

[2] United States *v.* Marks, 2 Abb. U. S. 531, 536.

[3] United States *v.* Wilcox, 4 Blatch. 385; United States *v.* Bickford, 4 Blatch. 337.

[4] United States *v.* Jennison, 1 McCrary, 226; United States *v.* Wilcox, supra. **False Affidavit,** — presenting, to commissioner of pensions, United States *v.* Staats, 8 How. U. S. 41.

[5] Rex *v.* Keefe, Jebb, 6; Rex *v.* Fitzmaurice, Jebb, 29. And see ante, § 426.

CHAPTER LXVI.

PERJURY.[1]

§ 869. **Preparing to draw Indictment.** — It will not be safe for the inexperienced pleader to construct an indictment for perjury after a form provided for him, until he has carefully read what in "Criminal Procedure" is said of the indictment,[2] and laid before him the statutes and judicial determinations of his own State relating thereto. For enough depends upon differing statutory terms or the absence of statutes, and upon conflicting views of the common law relating to certain questions, to render steps in disregard of this caution too dangerous to be judicious. But one who has thus prepared himself will encounter no difficulties, nor will he need the help of numerous forms. Therefore, —

§ 870. **How this Chapter.** — Though the subject of this chapter is large, and the books are crowded with precedents upon it, no great number of forms will be herein presented, while yet the references to places where forms may be found will be full. Its purpose is to give what the pleader will discover, in practice, to be needed help, not to pile up a mass of matter the examination whereof will consume his time without profit.

§ 871. **Formula for Indictment.** — In this offence, as in others, the order of the averments is immaterial. And convenience has, in the mass of precedents, varied it somewhat with the different sorts of perjury. So, also, in the parts of the precedents relating to the jurisdiction of the tribunal or magistrate, the authority to administer the oath, and the materiality of the matter alleged to be perjured, where the pleader at his election may either charge the

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 1014–1056; Crim. Proced. II. § 899–939. Incidental, Crim. Law, I. § 298, 320, 437, 468, 564, 589, 734, 942, 974, 975; Crim. Proced. I. § 470, 480, 529, 857, 858, 864; Stat. Crimes, § 129, 183, 815. And see SUBORNATION OF PERJURY.

[2] Crim. Proced. II. § 901–926.

thing in words or set out facts whence it will judicially appear,[1] the forms vary with what in differing classes of cases has been found practically convenient. Hence various details of the averments can best be given in the subsequent sections. In outline, still bearing in mind that the order of the allegations is unimportant and changing, they are, —

That on, &c. at, &c. [ante, § 80], before the court of, &c. [*or*, before M, esquire, a justice of the peace in and for said county, *or*, &c. as the particular case may require], on an issue within the jurisdiction of said court duly joined, and trial thereof before a jury of the country, between X [ante, § 78, 79] as plaintiff and Y [ante, § 78, 79] as defendant [2] [*or*, &c. setting out any differing facts], A, &c. [ante, § 74–77] was in due form of law sworn by said court [3] [*or*, by said M], having competent authority to administer to him the oath, to speak the truth, the whole truth, and nothing but the truth touching the matters then and there in controversy between the said X and the said Y [*or*, varying these allegations as the particular facts and sort of case require]. Whereupon it then and there became and was a question material to said issue whether [say what], and to this the said A did then and there [feloniously [4]] wilfully and corruptly testify and say, in substance and effect, that, &c. [setting out the part [5] of his testimony which relates to the particular point, in exact substance and as nearly as convenient in his exact words, together with any explanations necessary to a proper understanding of it]; whereas, in truth and in fact, as the said A then and there well knew, &c. [proceeding with the proper denial of the truth; *or*, &c. varying the allegations otherwise to suit the particular case, but adhering to the principles on which the foregoing are constructed]; against the peace, &c. [ante, § 65–69].[6]

[1] Crim. Proced. II. § 910 *a*, 914, 921.

[2] As to how full these allegations must be, and whether the record must be set out entire, see Crim. Proced. II. § 905–911; ante, § 91–97. How in these and other respects the indictment is in the United States courts, see R. S. of U. S. § 5396.

[3] Some pleaders would prefer to add, at any appropriate place, the name of the judge presiding. Still this is believed not to be essential where the perjury is before a court with a name which is given. But where it is before an unnamed tribunal, or is in an affidavit before a magistrate, the name of the official person should be alleged. Crim. Proced. II. § 910.

[4] To be inserted when the offence is felony.

[5] Compare with ante, § 619, note. So here, if the matter charged as perjured was not continuous in the testimony, it is the safer method — though to me it does not seem in principle necessary where, as here, the substance instead of the tenor is set out — to adapt the averments to this fact; as, —

At one place, in his said evidence and testimony, that, &c. and at another place therein that, &c.

[6] For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 868, 882, 884, 885; 2 Chit. Crim. Law, 318–485; 4 Went. Pl. 230–305; 6 Ib. 423, 424; 1 Cox C. C. App. 7; 2 Ib. App. 5; 4 Ib. App. 6, 16; 5 Ib. App. 45, 61–76, 82, 84; 6 Ib. 85, 118, 141; Trem. P. C. 136–168; Rex *v.* Oates, 10 Howell St. Tr. 1079, 1227; Rex *v.* Heath, 18 Howell St. Tr. 1, 46; Rex *v.* Gibbons, 19 Howell St. Tr. 275, 278; Rex *v.* Canning, 19 Howell St. Tr. 283, 284; Rex *v.* Greep, 5 Mod. 342; Rex *v.* Cross-

§ 872. **Essential — Common Surplusage.** — The averments must show a proceeding or occasion wherein false swearing is perjury —

ley, 7 T. R. 315; Rex *v.* Stevens, 5 B. & C. 246; Reg. *v.* Virrier, 12 A. & E. 317; Reg. *v.* Overton, 4 Q. B. 83; Reg. *v.* Scotton, 5 Q. B. 493; Reg. *v.* Moreau, 11 Q. B. 1028; Reg. *v.* Dunn, 12 Q. B. 1026; Dunn *v.* Reg. 12 Q. B. 1031; Lavey *v.* Reg. 17 Q. B. 496; Walker *v.* Reg. 8 Ellis & B. 439; Reg. *v.* Scott, 2 Q. B. D. 415, 13 Cox C. C. 594; Reg. *v.* Orton, 5 Q. B. D. 490, 14 Cox C. C. 436; Rex *v.* Brady, 1 Leach, 4th ed. 327; Rex *v.* Lincoln, Russ. & Ry. 421; Reg. *v.* Keat, 2 Moody, 24; Reg. *v.* Gardiner, 2 Moody, 95, 8 Car. & P. 737; Reg. *v.* Ewington, 2 Moody, 223, Car. & M. 319; Reg. *v.* Overton, 2 Moody, 263, Car. & M. 655; Reg. *v.* Chapman, 1 Den. C. C. 432, 440; Reg. *v.* Bennett, 2 Den. C. C. 240, 3 Car. & K. 124, 5 Cox C. C. 207; Lavey *v.* Reg. 2 Den. C. C. 504, 5 Cox C. C. 269; Reg. *v.* Webster, Bell C. C. 154, 8 Cox C. C. 187; Reg. *v.* Westley, Bell C. C. 193, 195, 8 Cox C. C. 244; Reg. *v.* Senior, Leigh & C. 401, 9 Cox C. C. 469; Reg. *v.* Shaw, Leigh & C. 579, 10 Cox C. C. 66; Reg. *v.* Proud, Law Rep. 1 C. C. 71, 10 Cox C. C. 455; Reg. *v.* Western, Law Rep. 1 C. C. 122, 11 Cox C. C. 93; Reg. *v.* Parker, Law Rep. 1 C. C. 225, 11 Cox C. C. 478; Reg. *v.* Dunning, Law Rep. 1 C. C. 290, 11 Cox C. C. 651; Rex *v.* Hawkins, Peake, 8; Rex *v.* Taylor, 1 Camp. 404; Rex *v.* Leefe, 2 Camp. 134; Rex *v.* Hucks, 1 Stark. 521, 524; Rex *v.* Tucker, 2 Car. & P. 500; Rex *v.* Moody, 5 Car. & P. 23; Rex *v.* Harris, 7 Car. & P. 253; Reg. *v.* Pearson, 8 Car. & P. 119; Reg. *v.* Wheatland, 8 Car. & P. 238; Reg. *v.* Hewins, 9 Car. & P. 786; Reg. *v.* Yates, Car. & M. 132; Reg. *v.* Christian, Car. & M. 388; Reg. *v.* Goodfellow, Car. & M. 569; Reg. *v.* Parker, Car. & M. 639; Reg. *v.* Overton, Car. & M. 655; Reg. *v.* Boynes, 1 Car. & K. 65; Reg. *v.* Fellowes, 1 Car. & K. 115; Reg. *v.* Bartholomew, 1 Car. & K. 366; Reg. *v.* Newton, 1 Car. & K. 469; Reg. *v.* Hughes, 1 Car. & K. 519; Reg. *v.* Dunn, 1 Car. & K. 730; Reg. *v.* Roberts, 2 Car. & K. 607; Reg. *v.* Turner, 2 Car. & K. 732; Reg. *v.* Hankins, 2 Car. & K. 823, 825, note; Reg. *v.* Garvey, 1 Cox C. C. 111; Reg. *v.* Satchell, 2 Cox C. C. 137; Reg. *v.* Schlesinger, 2 Cox C. C. 200; Reg. *v.* Kimpton, 2 Cox C. C. 296; Ryalls *v.* Reg. 3 Cox C. C. 36; Reg. *v.* Whitehouse, 3 Cox C. C. 86; Dunn *v.* Reg. 3 Cox C. C. 205; Ryalls *v.* Reg. 3 Cox C. C. 254; Reg. *v.* Ward, 3 Cox C. C. 279; Reg. *v.* Browning, 3 Cox C. C. 437; Reg. *v.* Worley, 3 Cox C. C. 535; Reg. *v.* Withers, 4 Cox C. C. 17; Reg. *v.* Cutts, 4 Cox C. C. 435; Reg. *v.* Child, 5 Cox C. C. 197; Reg. *v.* Newall, 6 Cox C. C. 21; Reg. *v.* Taylor, 6 Cox C. C. 58; Reg. *v.* Neville, 6 Cox C. C. 69; Reg. *v.* Lawlor, 6 Cox C. C. 187, 188; Reg. *v.* Legge, 6 Cox C. C. 220; Reg. *v.* Ball, 6 Cox C. C. 360; Reg. *v.* Kirton, 6 Cox C. C. 393; Reg. *v.* Courtney, 7 Cox C. C. 111, 113; Reg. *v.* Harvey, 8 Cox C. C. 99; Reg. *v.* Fairlie, 9 Cox C. C. 209; Reg. *v.* Bray, 9 Cox C. C. 218; Reg. *v.* Pearce, 9 Cox C. C. 258; Rex *v.* Prendergast, Jebb, 64; Reg. *v.* Gaynor, Jebb, 262; Reg. *v.* Clement, 26 U. C. Q. B. 297; Reg. *v.* Mason, 29 U. C. Q. B. 431.

Alabama. — The State *v.* Lea, 3 Ala. 603; Gibson *v.* The State, 44 Ala. 17, 21; Hood *v.* The State, 44 Ala. 81; Johnson *v.* The State, 46 Ala. 212; Jacobs *v.* The State, 61 Ala. 448.

Arkansas. — The State *v.* Green, 24 Ark. 591; The State *v.* Kirkpatrick, 32 Ark. 117; Nelson *v.* The State, 32 Ark. 192.

California. — People *v.* Brilliant, 58 Cal. 214.

Connecticut. — Arden *v.* The State, 11 Conn. 408.

Florida. — Humphreys *v.* The State, 17 Fla. 381, 383; Dennis *v.* The State, 17 Fla. 389, 390.

Georgia. — Hembree *v.* The State, 52 Ga. 242; Pennaman *v.* The State, 58 Ga. 336.

Illinois. — Morrell *v.* People, 32 Ill. 499; Kimmel *v.* People, 92 Ill. 457.

Indiana. — Weathers *v.* The State, 2 Blackf. 278; Galloway *v.* The State, 29 Ind. 442; The State *v.* Walls, 54 Ind. 407; The State *v.* Schultz, 57 Ind. 19; The State *v.* Howard, 63 Ind. 502.

Iowa. — United States *v.* Morgan, Morris, 341; United States *v.* Dickey, Morris, 412; The State *v.* Schill, 27 Iowa, 263; The State *v.* Kinley, 43 Iowa,

an oath administered by a person or court having authority — something sworn to — its materiality — its known falsity.[1] And to render all plain, it may or may not be necessary, according to the special exigencies of the case, to allege, as in libel,[2] matter of inducement, and to explain the words of the perjury by innuendoes.[3] Now, from early days in England, it has been the common practice to augment these needful allegations by immense

294; The State *v.* Nickerson, 46 Iowa, 447.

Kentucky. — Commonwealth *v.* Powell, 2 Met. Ky. 10.

Louisiana. — The State *v.* Gibson, 26 La. An. 71.

Maine. — The State *v.* Corson, 59 Maine, 137.

Maryland. — Deckard *v.* The State, 38 Md. 186, 188.

Massachusetts. — Commonwealth *v.* Knight, 12 Mass. 274; Commonwealth *v.* Warden, 11 Met. 406; Commonwealth *v.* Flynn, 3 Cush. 525; Commonwealth *v.* Johns, 6 Gray, 274; Commonwealth *v.* Carel, 105 Mass. 582; Commonwealth *v.* Kimball, 108 Mass. 473; Commonwealth *v.* Terry, 114 Mass. 263; Commonwealth *v.* Grant, 116 Mass. 17; Commonwealth *v.* Butland, 119 Mass. 317, 318; Commonwealth *v.* McLaughlin, 122 Mass. 449; Commonwealth *v.* Sargent, 129 Mass. 115.

Michigan. — People *v.* Fox, 25 Mich. 492.

Mississippi. — Cothran *v.* The State, 39 Missis. 541.

Missouri. — The State *v.* Bailey, 34 Misso. 350; The State *v.* Marshall, 47 Misso. 378; The State *v.* Keel, 54 Misso. 182; The State *v.* Foulks, 57 Misso. 461; The State *v.* Hamilton, 65 Misso. 667; The State *v.* Wakefield, 9 Misso. Ap. 326.

New Hampshire. — The State *v.* Hascall, 6 N. H. 352; The State *v.* Bailey, 11 Fost. N. H. 521.

New York. — People *v.* Phelps, 5 Wend. 9; Campbell *v.* People, 8 Wend. 636; Eighmy *v.* People, 79 N. Y. 546; Burns *v.* People, 5 Lans. 189; People *v.* Burroughs, 1 Parker C. C. 211; Smith *v.* People, 1 Parker C. C. 317; People *v.* Sweetman, 3 Parker C. C. 358; People *v.* McKinney, 3 Parker C. C. 510.

North Carolina. — The State *v.* Ammons, 3 Murph. 123; The State *v.* Mumford, 1 Dev. 519; The State *v.* Carland, 3 Dev. 114; The State *v.* Bobbitt, 70 N. C. 81; The State *v.* Colbert, 75 N. C. 368; The State *v.* Davis, 84 N. C. 787.

Ohio. — Crusen *v.* The State, 10 Ohio State, 258; The State *v.* Jackson, 36 Ohio State, 281.

Pennsylvania. — Perdue *v.* Commonwealth, 15 Norris, Pa. 311.

South Carolina. — The State *v.* Hayward, 1 Nott & McC. 546; The State *v.* McCroskey, 3 McCord, 308.

Tennessee. — The State *v.* Steele, 1 Yerg. 394; Lamden *v.* The State, 5 Humph. 83; The State *v.* Moffatt, 7 Humph. 250; The State *v.* Bowlus, 3 Heisk. 29; The State *v.* Wise, 3 Lea, 38; Lawson *v.* The State, 3 Lea, 309.

Texas. — The State *v.* Lindenburg, 13 Texas, 27; The State *v.* Powell, 28 Texas, 626; The State *v.* Webb, 41 Texas, 67, 68; The State *v.* Smith, 43 Texas, 655; Massie *v.* The State, 5 Texas Ap. 81; Martinez *v.* The State, 7 Texas Ap. 394; Rohrer *v.* The State, 13 Texas Ap. 163, 166; Gabrielsky *v.* The State, 13 Texas Ap. 428; Cox *v.* The State, 13 Texas Ap. 479.

Vermont. — The State *v.* Chamberlin, 30 Vt. 559.

Virginia. — Conner *v.* Commonwealth, 2 Va. Cas. 30; Commonwealth *v.* Hickman, 2 Va. Cas. 323; Commonwealth *v.* Stockley, 10 Leigh, 678; Thomas *v.* Commonwealth, 2 Rob. Va. 795; Commonwealth *v.* Roach, 1 Grat. 561; Commonwealth *v.* Pickering, 8 Grat. 628.

West Virginia. — Stofer *v.* The State, 3 W. Va. 689.

[1] Crim. Proced. II. § 901 et seq.

[2] Ante, § 618; Crim. Proced. II. § 783, 785–787, 793, 794.

[3] 2 Chit. Crim. Law, 310, 311; Rex *v.* Aylett, 1 T. R. 63; Rex *v.* Taylor, 1 Camp. 404; Rex *v.* Greepe, 2 Salk. 513; s. c. nom. Rex *v.* Griepe, 1 Ld. Raym. 256.

masses of surplusage. Even the full setting out of judicial records, which seems once to have been the ordinary course, required neither by legal principle nor, so far as can now be discovered, by judicial decisions, was taken from the indictment only by the kindly hand of legislation.[1] Yet other surplusage remains, deforming the precedents, and working in practice its natural mischiefs. The presentation of something of it here becomes necessary, the same under this title as under others, for the purpose of so pointing it out to pleaders as to enable those who may wish to avoid it, to proceed therein with confidence. Thus, —

§ 873. **Affidavit — (Common English Form).** — The current books of English practice furnish, as the model for pleaders, the following precedent of the indictment for perjury in an affidavit to hold to bail, — plethoric with verbosity, and loaded with surplusage: —

That A, &c. [wickedly and maliciously contriving and intending unjustly to aggrieve one X, and to put him the said X to great expense,[2] and also] unjustly and maliciously to cause him the said X to be arrested for the sum of fifty pounds, by virtue of a certain writ of our Lady the Queen, called a capias, to be sued out and prosecuted at the suit of him the said A,[3] on, &c. at, &c. came in his proper person before Sir O, knight, then being one of the justices of the court of our Lady the Queen before the Queen herself, and then and there produced a certain affidavit in writing of him the said A, and then and there before the said Sir O, knight, in due form of law was sworn [and took his corporal oath upon the Holy Gospel of God [4]] concerning the truth of the matters contained in the said affidavit (he the said Sir O, knight, then and there having a lawful and competent power and authority to administer the said oath to the said A in that behalf); and that the said A, being so sworn as aforesaid [not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil [5]], then and there, upon his oath aforesaid, before the said Sir O, knight (the said Sir O, knight, then and there having a lawful and compe-

[1] Crim. Proced. II. § 905–909.

[2] There can be and is no pretence that this matter is necessary. No such specific intent is an element in the offence. Crim. Law, I. § 1045–1048. And see ante, § 46, 48.

[3] This averment is in more words than necessary. But I think the occasion for taking an affidavit, or the purpose for which it is to be used, ought, where this matter does not appear in the affidavit itself, in some way to be alleged, as explaining its materiality; and, where jurisdiction is not directly averred, or does not appear otherwise, to this question also. Therefore I should recommend the insertion of this sort of allegation in all indictments on affidavits, though it may not in all be strictly necessary. And see Crim. Proced. II. § 911.

[4] Needless, and practically objectionable as compelling proof that the oath was taken in this form. Crim. Proced. II. § 912, 913.

[5] Not necessary. Ante, § 44.

tent power and authority to administer the said oath to the said A in that behalf),[1] falsely, corruptly, knowingly, wilfully, and maliciously, in and by his said affidavit in writing, did depose and swear (amongst other things) in substance and to the effect following, that is to say, that X (meaning the said X above mentioned) was then justly and truly indebted unto him the said A in the sum of fifty pounds, for goods sold and delivered by the said A to the said X, and at his (meaning the said X's) request; [as in and by the said affidavit of the said X, affiled in the said court of our said Lady the Queen before the Queen herself, more fully and at large appears [2]]; whereas, in truth and in fact, the said X, at the time the said A took his said oath and made his affidavit aforesaid, was not indebted to him the said A in the sum of fifty pounds for goods sold and delivered by the said A to the said X; and whereas, in truth and in fact, the said X was not then indebted to the said A in the sum of fifty pounds on any account whatsoever; and whereas, in truth and in fact, the said X was not then indebted to the said A in any sum whatsoever, on any account whatsoever.[3] [And so the jurors aforesaid upon their oath aforesaid do say, that the said A, on the third day of August in the year last aforesaid, at London aforesaid in the parish and ward aforesaid, before the said Sir O, knight (he the said Sir O, knight, then and there having such power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and

[1] There can be no occasion to repeat the authority of the judge, and in other respects these averments are in more words than are required.

[2] This averment that the affidavit was filed in court is natural enough and common; still, as the defendant's guilt does not depend on what is done after the false swearing has transpired, it is wholly useless. Rex *v.* Crossley, 7 T. R. 315. "But where the proceeding is under the statute of Elizabeth, by which an action is given to the party injured by the false oath, it should be shown that the affidavit was produced and used against that party." 1 Stark. Pl. 2d ed. 121.

[3] **Assignment of the Perjury — (Defendant's Knowledge).** — Of these three several denials of one simple fact, the last, which comprehends in its meaning the other two, is, beyond doubt, as effective for every purpose as the three combined. There is another question which, considered in the light of principle, is more serious. It is not perjury for a man to swear to what is false believing it to be true, and it is perjury for him to swear to what is true believing it to be false. His belief, not the fact, is the criterion. Crim. Law, I. § 320; II. § 1043–1048; Bishop First Book, § 117–119. From this it would follow, that, to bring the assignment of the perjury within the law of the offence, there must be added to the words in the text the phrase "as the said A then and there well knew," or something else to the like effect. And there is no escape from this conclusion, unless on the assumption that the averment of a fact is a *prima facie* setting out also that the defendant knew it, — a sort of reasoning never permitted to govern the indictment for cheating by false pretences. Ante, § 420; Crim. Proced. II. § 163, 172. Still the precedents in general are, on this point, largely the same as the one in the text, and they appear to be accepted as good. The State *v.* Raymond, 20 Iowa, 582. An exception, all admit, occurs where the swearing is, in terms, to the defendant's belief. Crim. Proced. II. § 920. Were I a prosecuting officer, however confident I might be that my court would adjudge the question in line with the old precedents, I should follow in practice what I saw to be right in principle, in a case where, as in the present, no objection could come from the court.

corrupt perjury [1]]; [to the great displeasure of Almighty God, in contempt of our Lady the Queen and her laws, to the evil and pernicious example of all others in the like case offending,[2] and] against the peace, &c.[3]

§ 874. **Condensed and Comprehensive, for Affidavit.** — Affidavits are required for so many purposes, under so many circumstances, that to give a form of indictment for perjury in every one would be impossible were it desirable. The following may be easily adapted to differing facts, it is compact in language, and is believed to be sufficient under the common law or on any statute the terms whereof it duly covers : —

That on, &c. at, &c. the matter of the hereinafter mentioned affidavit became and was material to an issue [*or* inquiry, *or* issue and inquiry] then pending [*or* about to be made, *or* then pending and about to be made] before and within the jurisdiction of, &c. [giving the name of the court or department of government before which the issue or inquiry is pending or to come, if it has a name, otherwise the individual name of the magistrate or other officer, and varying or enlarging this statement as the particular case will indicate] there [*or*, at, &c. if the hearing of the question to which the affidavit relates is to be at a place other than where it is taken] ;[4] whereupon A, &c. did then and there [*or*, then, at the place first above written, *or* at the said N] wilfully [feloniously] and corruptly make solemn oath before, &c. [giving the name of the court, magistrate, or other officer before whom or which the oath is taken], having lawful authority to administer the same, that a certain written affidavit was and is true, in substance and effect that [here setting out the affidavit] ; whereas, in truth and in fact, &c. [proceeding with the proper denials of its truth], as the said A then and there well knew ; against the peace, &c.[5]

[1] Unnecessary. Crim. Proced. II. § 903 and note. And compare with ante, § 743 and note.

[2] None of the matter in these brackets is necessary. Ante, § 44, 45, 48 ; Crim. Proced. I. § 501, 647.

[3] Archb. Crim. Pl. & Ev. 10th ed. 566, 567, 19th ed. 868.

[4] In these descriptive parts, the pleader should avoid following too closely any form from a book. The facts are endless in diversity, and the indictment should cover them, not the precedent or form.

[5] For forms and precedents, see Rohrer *v.* The State, 13 Texas Ap. 163, 166 ; Reg. *v.* Clement, 26 U. C. Q. B. 297 ; Jacobs *v.* The State, 61 Ala. 448 ; The State *v.* Lea, 3 Ala. 603 ; Dunn *v.* Reg. 3 Cox C. C. 205 ; Reg. *v.* Newton, 1 Car. & K. 469 ; Rex *v.* Crossley, 7 T. R. 315 ; Rex *v.* Hutchinson, Trem. P. C. 164 ; Rex *v.* Hawkins, Trem. P. C. 167 ; 2 Chit. Crim. Law, 324, 325, 327, 328, 334, 336-338, 340, 343, 344, 348, 374, 377, 380, 382, 411, 412, 414, 416, 427, 440, 443, 445, 446, 448, 470, 471, 473, 484 ; 4 Went. Pl. 230, 232, 242, 246, 253, 258, 260, 263, 264, 277, 278, 281. To various particulars in connection with bail, Commonwealth *v.* Carel, 105 Mass. 582 ; Commonwealth *v.* Sargent, 129 Mass. 115 ; 2 Chit. Crim. Law, 318, 320, 321, 323, 329, 330, 332 ; 4 Went. Pl. 249, 271 ; 6 Ib. 423, 424. In depositions, 2 Chit. Crim. Law, 422 ; 4 Went. Pl. 235 ; Rex *v.* Stone, Trem. P. C. 148 ; Rex *v.* Boucher, Trem. P. C. 150 ; Rex *v.* Sotherton, Trem. P. C. 155 ; Rex *v.* H. P. Trem. P. C. 162. And see other places in subsequent sections.

§ 875. **Testimony at Trial — (Common Form).** — Adapting to American use, from a current book of English practice, a precedent for the indictment against one who had testified falsely as a witness in the trial of a cause, we have, —

That heretofore, on, &c. at, &c. before a court of, &c. [giving the name of the court], the Honorable O one of the justices thereof presiding, a certain issue between one X and one Y, in a certain plea of trespass and assault, wherein the said X was plaintiff, and the said Y defendant, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which said trial A, &c. then and there appeared as a witness for and on behalf of the said Y, the defendant in the plea aforesaid, and was then and there duly sworn [and took his corporal oath upon the Holy Gospel of God[1]] before the said Honorable O, so being such justice as aforesaid, that the evidence which he the said A should give to the court there, and to the said jury so sworn as aforesaid, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth (he the said Honorable O, justice as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said A, in that behalf). And [the jurors first aforesaid upon their oath aforesaid do further present[2]] that, at and upon the trial of the said issue so joined between the said parties as aforesaid, it then and there became and was a material question whether the said Y assaulted and beat the said X. And [the jurors first aforesaid upon their oath aforesaid do further present[3]] that the said A, being so sworn as aforesaid [not having the fear of God before his eyes, nor regarding the laws of this State, but being moved and seduced by the instigation of the Devil, and contriving and intending to pervert the due course of law and justice, and unjustly to aggrieve the said X, the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses[4]], then and there, on the trial of the said issue, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said jurors so sworn as aforesaid, and before the said Honorable O, justice as aforesaid, did depose and swear (amongst other things), in substance and to the effect following, that is to say, that, &c. [setting out, with innuendoes when necessary,[5] so much of A's testimony as is to be made the foundation for the assignment of his perjury]. Whereas, in truth and in fact, &c. [proceeding to assign the perjury as at ante, § 873]. [And so the jurors aforesaid upon their oath aforesaid do say, &c. as at ante, § 873; and, as there, *unnecessary*]; against the peace, &c.[6]

[1] Unnecessary and better omitted. Crim. Proced. II. § 912, 913; ante, § 873.

[2] Unnecessary. Ante, § 64, 115, note.

[3] Unnecessary, as above.

[4] It is believed that no part of the matter in these brackets is either necessary or desirable. Ante, § 44–48, 873 and note.

[5] Ante, § 872.

[6] Archb. Crim. Pl. & Ev. 10th ed. 573, 19th ed. 882. And compare with ante, § 871

§ 876. **Other Forms** — might be multiplied to an indefinite extent. But the principles which govern all are fully illustrated in the foregoing sections. Much space would be occupied to little purpose should we proceed further in the text. Yet the pleader may occasionally derive help from an examination of the precedents cited in the note.[1]

and notes, and the notes to ante, § 873. This form, omitting the matter in brackets, is in more words than necessary; but the pleader has already the suggestions for compressing it, should he desire. And see for other forms and precedents, 2 Chit. Crim. Law, 349, 351, 353, 355, 356, 358, 360, 361, 364, 366, 368, 395, 406, 437, 452, 453, 455, 457–460, 463–466, 468; 4 Went. Pl. 239, 244, 250, 266, 273, 275; 6 Ib. 396; 1 Cox C. C. App. 7; Rex *v.* Cross, Trem. P. C. 136; Rex *v.* Jole, Trem. P. C. 138; Rex *v.* Hanson, Trem. P. C. 143; Rex *v.* C. T. Trem. P. C. 144; Rex *v.* Trotter, Trem. P. C. 146; Rex *v.* Saxon, Trem. P. C. 157; Reg. *v.* Turner, 2 Car. & K. 732; Hembree *v.* The State, 52 Ga. 242; People *v.* Burroughs, 1 Parker C. C. 211; The State *v.* Corson, 59 Maine, 137. In Reg. *v.* Webster, Bell C. C. 154, 8 Cox C. C. 187, a form quite condensed was sustained. **Witness in Own Case.** — In Reg. *v.* Scott, 13 Cox C. C. 594, less fully reported 2 Q. B. D. 415, it was adjudged good to aver (slightly varying some of the expressions to suit our own practice), —

That heretofore an action was brought in the M court, wherein A, &c. was plaintiff and X was defendant, and on, &c. at, &c. it came on for hearing before the Honorable O, one of the justices of said court, and then and there the said A did appear as a witness upon the hearing thereof, and was duly sworn by the said O, having competent authority therefor, to give true evidence therein; whereupon the said A did then and there, on his oath so as aforesaid taken, falsely, corruptly, knowingly, and maliciously depose and swear, among other things, in substance and to the effect, that he the said A never did in any way employ or consult M and N as his legal counsel, that he never executed any mortgage or deed relating to the property claimed by him in said action, and that the allegation in the statement of defence in said action that he executed the deeds therein mentioned was untrue, and that he did not execute any of such deeds. Whereas, in truth and in fact, the said A did employ and consult the said M and N as his legal counsel, and did execute divers mortgage and other deeds relating to the property claimed by him in said action, and the said allegation in the said statement of defence was true, and the said A did execute some or all of said deeds; and the said false statements, so upon oath made by the said A, were material to the questions and matter then and there in issue before the court, and the said A did thereby then and there commit wilful and corrupt perjury; against the peace, &c.

Here was a transposition of the common order of the averment of materiality, and some of the judges deemed the construction of the allegations inartificial. It does not seem quite so to me. Compare their observations with Crim. Proced. II. § 921, and the places there referred to.

[1] **Equity,** — Perjuries in various proceedings in, 2 Chit. Crim Law, 384, 386, 391, 392, 398, 399; 4 Went. Pl. 292; 6 Cox C. C. App. 85; Rex *v.* Brooks, Trem. P. C. 151; Reg. *v.* Hewins, 9 Car. & P. 786; Lamden *v.* The State, 5 Humph. 83; Commonwealth *v.* Warden, 11 Met. 406. **Bankruptcy and Insolvency,** — in various proceedings in, ante, § 236; 2 Chit. Crim. Law, 402; 4 Cox C. C. App. 6; 5 Ib. App. 72; Reg. *v.* Keat, 2 Moody, 24; Rex *v.* Moody, 5 Car. & P. 23; Reg. *v.* Ewington, 2 Moody, 223, Car. & M. 319; Reg. *v.* Westley, 1 Bell C. C. 193, 195, 8 Cox C. C. 244; Reg. *v.* Parker, Car. & M. 639; Reg. *v.* Legge, 6 Cox C. C. 220; United States *v.* Morgan, Morris, 341; United States *v.* Dickey, Morris, 412. **Elections,** — in various proceedings connected with, 6 Cox C. C. App. 118; Rex *v.* Harris, 7 Car. & P. 253; Campbell *v.* People, 8 Wend. 636; Burns *v.* People, 5 Lans. 189; Humphreys *v.* The State, 17 Fla. 381, 383; Dennis *v.* The State, 17 Fla. 389, 390. **Magistrate,** — before, 2 Chit. Crim. Law, 432, 434, 435; 4 Went. Pl. 244; Reg. *v.* Goodfellow, Car. & M. 569; Reg. *v.* Gardi-

§ 877. **In Nature of Perjury.** — There are false affirmations on oath, which, while not technical perjury, are in the nature of it.[1] The indictment follows the same general rules as for perjury. There are various statutory sorts of this offence; but a mere reference to places where precedents may be found will adequately supply the demands of the pleader.[2]

ner, 2 Moody, 95, 8 Car. & P. 737; Pennaman *v.* The State, 58 Ga. 336. **Bastardy,** — in proceedings of, 2 Chit. Crim. Law, 438, 439. **Naturalization,** — in application for, People *v.* Sweetman, 3 Parker C. C. 358. **Juror,** — in answers of, as to competency, The State *v.* Howard, 63 Ind. 502; The State *v.* Moffatt, 7 Humph. 250; Commonwealth *v.* Stockley, 10 Leigh, 678. **Legislative Committee,** — before, 2 Chit. Crim. Law, 418; 4 Went. Pl. 300; Rex *v.* Leefe, 2 Camp. 134. **Tax Commissioners,** — before, Reg. *v.* Overton, 2 Moody, 263, Car. & M. 655. **Grand Jury,** — before, Reg. *v.* Hughes, 1 Car. & K. 519; The State *v.* Keel, 54 Misso. 182, 184; The State *v.* Hamilton, 65 Misso. 667; Massie *v.* The State, 5 Texas Ap. 81; Thomas *v.* Commonwealth, 2 Rob. Va. 795; Commonwealth *v.* Pickering, 8 Grat. 628. **Arbitrators and Referees,** — before, 2 Chit. Crim. Law, 424; 4 Went. Pl. 256; Eighmy *v.* People, 79 N. Y. 546. **Poor Debtor,** — by, 2 Chit. Crim. Law, 346; Arden *v.* The State, 11 Conn. 408; People *v.* Phelps, 5 Wend. 9. **Supersedeas,** — in petition for writ of, Commonwealth *v.* Kimball, 108 Mass. 473. **Marriage License,** — in oath to obtain, Reg. *v.* Chapman, 1 Den. C. C. 432, 440, 2 Car. & K. 846, 848, note, 3 Cox C. C. 467; Reg. *v.* Fairlie 9 Cox C. C. 209. **Taken up Arms,** — in swearing that the party had not, Stofer *v.* The State, 3 W. Va. 689. **Surveyor of Customs,** — before, 2 Chit. Crim. Law, 442. **Interrogatories,** — in answer to, 2 Chit. Crim. Law, 397, 449. **Quaker,** — by, 4 Went. Pl. 256, 266. **Administration,** — to obtain, Rex *v.* Brady, 1 Leach, 4th ed. 327.

[1] For example, Crim. Law, II. § 1014.

[2] 2 Cox C. C. App. 5; 5 Cox C. C. App. 84; Reg. *v.* Parker, Law Rep. 1 C. C. 225, 11 Cox C. C. 478; Reg. *v.* Boynes, 1 Car. & K. 65; Reg. *v.* Browning, 3 Cox C. C. 437; The State *v.* Foulks, 57 Misso. 461; The State *v.* Marshall, 47 Misso. 378.

For PERSON, EXPOSURE OF, see ante, § 802–804.
PERSONATING, see ante, § 426, 868.
PETIT LARCENY, see LARCENY.
PICTURES, OBSCENE, &c. see ante, § 628–631, 798–801.

CHAPTER LXVII.

PIRACY.[1]

§ 878. **Varieties.** — This offence, under the law of nations, and as enlarged by statutes, is of considerable dimensions. It is explained in "Criminal Law," not quite minutely, but as fully as was deemed advisable in this series of works. To present a complete set of forms for the indictment for it would require more space than can be spared here. But, —

§ 879. **Under Law of Nations.** — The indictment under the law of nations,[2] adapting an English precedent to our use, may be, —

That A, &c. B, &c. and C, &c. [ante, § 74–77], who are now severally within this district, having been brought into it first after the commission of the hereinafter recited offence,[3] on, &c. [ante, § 80], on the high seas

[1] For the direct expositions of the law of this offence, see Crim. Law, II. § 1057–1063. Incidental, Ib. I. § 118–120, 306, 826, 985.

[2] Crim. Law, II. § 1058, 1060.

[3] R. S. of U. S. § 730. There are other more common methods of stating this matter, and the pleader will be likely to elect to follow the custom of his own court. Compare with Archb. Crim. Pl. & Ev. 19th ed. 948, under title "Bigamy." By the Act of April 30, 1790 (c. 9, § 8, 1 U. S. Stats. at Large, p. 114), "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought." A common method of averment was, after the indictment in however many counts was finished, to add, in a separate paragraph, —

And the jurors aforesaid upon their oath aforesaid do further present, that the said A was first brought into N aforesaid, in the district of S, after the commission of the said offence, and that the said district of S [so, with apparently needless repetition, adds a form before me] is the district into which he was first brought. Davis Prec. 222.

The present statute is somewhat differently expressed; namely, "The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district *where the offender is found*, or into which he is first brought." R. S. of U. S. § 730. The reader perceives that only the offender's presence ["where the offender is found"] in the district is now required to give the jurisdiction. Nor should I interpret this provision as making necessary even his presence in the district previous to his arraignment. If this interpretation is correct (I can give no assurance that the courts will follow it), and perhaps if it is not, there is no need to mention anywhere in the indictment that the defendant is within the district. For he cannot be tried or even plead or demur or move to quash the indictment without his presence in court (Crim. Proced. I. § 265–269, 728–730, 776); and the fact of his presence is palpable both

within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular State,[1] in and on board of a certain ship called the M [in a certain place upon the high seas distant about ten leagues from Q in P[2]], in and upon certain mariners whose names are to the jurors unknown [in the peace of, &c.[3]], piratically and feloniously did make an assault, and them the said mariners in bodily fear and danger of their lives, on the high seas aforesaid, then and there piratically and feloniously did put, and the said ship, called the M, and the apparel and tackle of the said ship, of the value of, &c. and seventy chests of opium, of the value of, &c. in and on board the said ship then and there being, of the goods and chattels of certain persons whose names are to the jurors unknown, and then and there in the custody and possession of the mariners aforesaid [with force and arms[4]], from the care, custody, and possession, and against the will of the said mariners, then and there, to wit, on the day and year last aforesaid, upon the high seas aforesaid, in the place aforesaid, and within the jurisdiction aforesaid,[5] piratically, feloniously, and violently did steal, take, and carry away; against the peace, &c. [ante, § 65–69].[6]

to the judicial and the common understanding. So also the fact appears of record in the return of the officer to the warrant of arrest, in his plea at the arraignment, and in other ways. And this reasoning, and substantially this conclusion, though not in exact form, are sustained by English adjudications. Reg. *v.* Whiley, 1 Car. & K. 150; Reg. *v.* Smythies, 1 Den. C. C. 498, 2 Car. & K. 878, 4 Cox C. C. 94, in which latter case the decision in the former is shown to have been wrongly reported in 2 Moody, 186. Still I have inserted in the text a form for alleging this jurisdictional matter; because, until the direct question is judicially settled with us, cautious pleaders will be likely to choose the path which is certainly safe.

[1] Ante, § 89; United States *v.* Gibert, 2 Sumner, 19, 85.

[2] In the form before me, and common; but not in all the precedents. Ante, § 89, and the places there referred to. Held to be unnecessary in United States *v.* Gibert, supra, at p. 85–87.

[3] Unnecessary. Ante, § 47.

[4] Unnecessary. Ante, § 43.

[5] There is here more repetition than necessary. See the indictments for larceny and robbery on land.

[6] Archb. Crim. Pl. & Ev. 10th ed. 264, 19th ed. 465. For other precedents for the common-law and statutory offence, see Rex *v.* Clarke, 4 Went. Pl. 50; Rex *v.* Kidd, 14 Howell St. Tr. 147; Reg. *v.* Quelch, 14 Howell St. Tr. 1067; Rex *v.* Bonnet, 15 Howell St. Tr. 1231, 1241, 1265, 1275; Rex *v.* Curling, Russ. & Ry. 123; 3 Chit. Crim. Law, 1093 *a*, 1094, 1096. Running away with vessel, United States *v.* Tully, 1 Gallis. 247.

CHAPTER LXVIII.

POLYGAMY.[1]

§ 880. **Diversities — (Elsewhere).** — The statutes against this offence differ in our States, and so require or permit differing forms for the indictment. Beyond which, there are differences of judicial opinion not reconcilable by this fact. All is so fully explained in "Statutory Crimes"[2] that it need not be further stated here.

§ 881. **Formula for Indictment — (Common English Form).** — The form in common use in England has remained unchanged through various modifications in the statutory expression, and it is good under most of our American enactments. Under some of ours, the expression may, if the pleader chooses, be abridged; and under a few it must be different, in order to cover the statutory terms. The formula, following it in the main, may be, —

That A, &c. [ante, § 74–77], on. &c. at,[3] &c. [ante, § 80], did marry and have for his wife one X [*or* did intermarry with and have for her husband one X]; and afterward [while he (*or* she) the said A was so married to the said X[4]], did, on, &c. at, &c. feloniously and unlawfully marry and take to wife [*or* intermarry with and take for her husband] one Y, the said X being still alive [*add*, if the place of the second marriage was not in the county of the indictment, and if there is a statute giving the jurisdiction, an averment of the fact which brings the case within the statute. One method, in England, is in substance to say], and afterward, on, &c. the said A came into the county of M [that of the indictment] and is now in custody at N in said county;[5] against the peace, &c.[6]

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Stat. Crimes, § 577–613. Incidental, Crim. Law, I. § 502; Crim. Proced. I. § 62, note, 638, 1154; Stat. Crimes, § 112, 229, 260 *a*.

[2] Stat. Crimes, § 598–606.

[3] The locality here will not necessarily be that of the indictment; it may even be in another State or a foreign country.

[4] Unnecessary. Murray *v.* Reg. 7 Q. B. 700.

[5] Compare with ante, § 879. But see, as to this, Stat. Crimes, § 587.

[6] Archb. Crim. Pl. & Ev. 10th ed. 629, 19th ed. 948. For other forms and precedents, see 3 Chit. Crim. Law, 718–721; 6

§ 882. **Under Differing Statutes.** — The statute of the United States forbidding polygamy in the territories[1] is, like most of our American enactments, so far modelled after the English ones[2] that such allegations as the foregoing are, not only sufficient, but appropriate, under it.[3] Likewise they are adequate, and they have been practically employed, under the simpler expression "shall have two wives or two husbands at one and the same time."[4] But if the facts are different, being within the latter statute, yet not the former, — as, if parties contract a polygamous marriage abroad, then come and reside here, — the pleader will hesitate to follow the foregoing form. The author, without the aid of a precedent, suggests the averments, —

That A, &c. on, &c. at,[5] &c. did marry and have for his wife one X, and afterward while the said X was living did, on, &c. at,[6] &c. marry and have

Cox C. C. App. 113; Rex *v.* Moders, 6 Howell St. Tr. 274; Reg. *v.* Fielding, 14 Howell St. Tr. 1327; Rex *v.* Kingston, 20 Howell St. Tr. 355, 369; Murray *v.* Reg. 7 Q. B. 700; Rex *v.* Edwards, Russ. & Ry. 283; Rex *v.* Waully, 1 Moody, 163; Reg. *v.* Whiley, 2 Moody, 185; Reg. *v.* Fanning, 10 Cox C. C. 411; Reg. *v.* McQuiggan, 2 L. C. 340.

Alabama. — McConico *v.* The State, 49 Ala. 6; Beggs *v.* The State, 55 Ala. 108; Cooley *v.* The State, 55 Ala. 162; Brewer *v.* The State, 59 Ala. 101.

Arkansas. — Scoggins *v.* The State, 32 Ark. 205; Walls *v.* The State, 32 Ark. 565; Halbrook *v.* The State, 34 Ark. 511.

Georgia. — King *v.* The State, 40 Ga. 244.

Illinois. — Jackson *v.* People, 2 Scam. 231.

Indiana. — Stat. Crimes, § 600.

Iowa. — The State *v.* Sloan, 55 Iowa, 217.

Kansas. — The State *v.* White, 19 Kan. 445.

Kentucky. — Davis *v.* Commonwealth, 13 Bush, 318, overruling Commonwealth *v.* Whaley, 6 Bush, 266.

Massachusetts. — Commonwealth *v.* Bradley, 2 Cush. 553; Commonwealth *v.* Johnson, 10 Allen, 196; Commonwealth *v.* Godsoe, 105 Mass. 464; Commonwealth *v.* Lane, 113 Mass. 458; Commonwealth *v.* Jennings, 121 Mass. 47; Commonwealth *v.* Richardson, 126 Mass. 34.

Minnesota. — The State *v.* Johnson, 12 Minn. 476; The State *v.* Armington, 25 Minn. 29.

New York. — Sauser *v.* People, 8 Hun, 302; Gahagan *v.* People, 1 Parker C. C. 378; Hayes *v.* People, 5 Parker C. C. 325; Fleming *v.* People, 5 Parker C. C. 353.

North Carolina. — The State *v.* Norman, 2 Dev. 222; The State *v.* Barnett, 83 N. C. 615.

Ohio. — Stanglein *v.* The State, 17 Ohio State, 453.

Pennsylvania. — Gise *v.* Commonwealth, 31 Smith, Pa. 428.

Texas. — May *v.* The State, 4 Texas Ap. 424; Watson *v.* The State, 13 Texas Ap. 76, 80.

Vermont. — The State *v.* La Bore, 26 Vt. 765.

West Virginia. — The State *v.* Goodrich, 14 W. Va. 834.

United States. — Miles *v.* United States, 103 U. S. 304.

[1] R. S. of U. S. § 5352.

[2] Stat. Crimes, § 581, 582.

[3] Miles *v.* United States, 103 U. S. 304.

[4] Gise *v.* Commonwealth, 31 Smith, Pa. 428.

[5] The place here may be in the locality of the indictment or out of it, as the fact is.

[6] Same as last note.

for his wife one Y, and afterward, on, &c. at,[1] &c. did unlawfully and feloniously have both the said X and the said Y for his two wives at one and the same time; against the peace, &c.[2]

§ 883. **Continuing to cohabit.** — Under the words "Whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this State, shall, except in the cases mentioned in the following section, be deemed guilty of polygamy, and be punished," &c.,[3] the allegations on the clause against continuing to cohabit may be similar to the form in the last section. The exception does not require to be negatived,[4] so the pleader may simply aver, —

That A, &c. on, &c. at, &c. did marry and have for his wife one X, and afterward, on, &c. at, &c. while the said X was still living, did unlawfully marry and have for his wife one Y; after which said two marriages, he the said A did, while the said X was still living, on, &c. at, &c. unlawfully and feloniously continue in this State to cohabit as in matrimony with the said Y; against the peace, &c.[5]

[1] This place must be within the jurisdiction of the court.

[2] I do not think it prudent to abridge these allegations further. Yet, in some of the States, less will be accepted, as explained Stat. Crimes, § 600-606. Thus, in Texas, — Watson *v.* The State, 13 Texas Ap. 76, 80, — it is good to aver, —

That A, &c. on, &c. at, &c. did unlawfully marry X, he the said A then having a wife still living; against the peace, &c.

[3] Mass. Gen. Stats. c. 165, § 4.

[4] Crim. Proced. I. § 638.

[5] The precedents before me contain some surplusage; and, on the other hand, while doubtless sufficient where employed, are a little less full at one or two places than an exact pleader might desire. I do not think it necessary to particularize, and say why I have made the several modifications. Commonwealth *v.* Jennings, 121 Mass. 47; Commonwealth *v.* Godsoe, 105 Mass. 464; Commonwealth *v.* Bradley, 2 Cush. 553; The State *v.* Goodrich, 14 W. Va. 834.

CHAPTER LXIX.

POSTAL OFFENCES.[1]

§ 884. **What for this Chapter.** — It is proposed, in this chapter, simply to refer to places where precedents of the indictment for these several offences may be found. Thus, —

§ 885. **Larcenies, Embezzlements, and the like.** — See the references in the note.[2]

§ 886. **Opening Letters,** — various offences of.[3]

§ 887. **Obscene Books, Lottery Circulars, &c.,** — illegally depositing in the mails, for transmission.[4]

§ 888. **Miscellaneous,** — in the note.[5]

[1] Crim. Law, II. § 904, note. Incidental, Ib. II. § 785; Crim. Proced. II. § 776 *a*; Stat. Crimes, § 823.

[2] **Larceny of Letter.** — 3 Chit. Crim. Law, 982; 6 Cox C. C. App. 12; Rex *v.* Skutt, 1 Leach, 4th ed. 106; Reg. *v.* Gardner, 1 Car. & K. 628; Reg. *v.* Harley, 1 Car. & K. 89; Rex *v.* Pooley, 2 Leach, 4th ed. 900, 3 B. & P. 315; Reg. *v.* Jones, 2 Car. & K. 236. **Same by Post-office Employees.** — Rex *v.* Ranson, 2 Leach, 4th ed. 1090. **Embezzling and Secreting,** — various forms of, 3 Chit. Crim. Law, 970; Rex *v.* Plumer, Russ. & Ry. 264; Rex *v.* Sharpe, 1 Moody, 125; Goodwin's Case, 1 Lewin, 212; Rex *v.* Pooley, 2 Leach, 4th ed. 887; Rex *v.* Moore, 2 Leach, 4th ed. 575; Rex *v.* Ellins, Russ. & Ry. 188; United States *v.* Golding, 2 Cranch C. C. 212; United States *v.* Baugh, 4 Hughes, 501, 502; United States *v.* Laws, 2 Lowell, 115, 116; United States *v.* Clark, Crabbe, 584. **Robbing Mail,** — various forms of, Rex *v.* Thomas, 2 Leach, 4th ed. 634; United States *v.* Mills, 7 Pet. 138; United States *v.* Wilson, Bald. 78, 7 Pet. 150, 152; United States *v.* Pearce, 2 McLean, 14; United States *v.* Hare, 2 Wheeler Crim. Cas. 283; Commonwealth *v.* Feely, 1 Va. Cas. 321. **From Letter,** — United States *v.* Randall, Deady, 524; Beery *v.* United States, 2 Col. Ter. 186. **Burning** — letters, &c. Reg. *v.* Batstone, 10 Cox C. C. 20.

[3] United States *v.* Mulvaney, 4 Parker C. C. 164; United States *v.* Pond, 2 Curt. C. C. 265.

[4] United States *v.* Bennett, 16 Blatch. 338; United States *v.* Whittier, 5 Dil. 35; United States *v.* Noelke, 17 Blatch. 554; United States *v.* Patty, 9 Bis. 429; Brand *v.* United States, 18 Blatch. 384, 386.

[5] **Obstructing Passage** — of mail, United States *v.* Porter, 3 Day, 283. **Post-office Order,** — wrongfully obtaining, 6 Cox C. C. App. 52. **Letter out of Mail,** — carrying, United States *v.* Tilden, 21 Law Reporter (Boston), 598.

For POUND-BREACH, see ante, § 173–175.
PREVIOUS CONVICTION AND OFFENCE, see ante, § 91–97.
PRINCIPAL, see ante, § 113–115, 119–121.

CHAPTER LXX.

PRISON BREACH, RESCUE, AND ESCAPE.[1]

§ 889. **Accessorial — (Elsewhere).** — The indictment against one who, having helped an arrested or imprisoned felon to break away or escape, is to be proceeded against as an accessory after the fact, is sufficiently explained in other connections.[2] This chapter is for the three several substantive offences.

§ 890. **Common to All — (Formula for Indictment).** — The part of the indictment which charges the arrest, imprisonment, or other detention, is the same in all of these offences. In other respects, while similar, it is varied to cover the particular offence. And always, if on a statute, it must fill the statutory terms. So it must always set out the facts special to the individual instance. Subject to modifications from these considerations, the formula may be, —

That on, &c. at, &c. [ante, § 80], X [ante, § 78, 79, *or* A, &c. ante, § 74–77] was lawfully arrested by and lawfully in the custody of Y, a constable of said town of N, for then and there in the presence of the said Y participating in a riot and breach of the public peace [3] [*or*, for being reasonably suspected of having lately before committed larceny of a certain horse the property of one Q;[4] *or*, was lawfully undergoing imprisonment in the county jail of said county, under sentence from O, esquire, a justice of the peace in and for said county, for assault and battery committed on one Q, the same being within the jurisdiction of said O, esquire; *or*, was lawfully in confinement in the house of correction in said county, under a sentence of the Court of Common Pleas of said county, for having lately theretofore attempted to commit a larceny from the person of one Q; *or*,

[1] For the direct elucidations of the law of these offences, with the pleading, practice, and evidence, see Crim. Law, II. § 1064–1106; Crim. Proced. II. § 940–946. Incidental, Crim. Law, I. § 218, 321, 359, 466, 639, 693, 695–697, 707; II. § 5; Crim. Proced. I. § 91, 161–163, 203, 269, 392, 404, 529, 1250, 1305, 1382–1386; Stat. Crimes, § 136, 217, 242.

[2] Ante, § 113, 114, 118, and under the titles of the several felonies.

[3] Crim. Proced. I. § 183.

[4] Ib. § 181, 182.

&c. setting out, according to the special fact, the detention in any similar way] ;[1] whereupon A, &c. [ante, § 74–77, *or* the said A], did then and there unlawfully [and feloniously [2]], &c. [setting out the particular offence, as will be detailed in subsequent sections of this chapter]; against the peace, &c. [ante, § 65–69].[3]

§ 891. **Against Prisoner for Escaping.** — The allegations may be, —

That A, &c. on, &c. at, &c. was undergoing lawful imprisonment in the, &c. [state the prison], in pursuance of the sentence of, &c. [saying what court or magistrate] for the offence of, &c. [say what offence, and, if the tribunal was an inferior one, add, within the jurisdiction [4] of the said,

[1] The precedents vary considerably in the manner of stating the custody of the escaping person. In some, the record, or warrant of arrest, or commitment, or the like, is set out at large, or fully described; partienlarly is this so in the older precedents. The question is in a measure within the discussions ante, § 91–97. But various indictments have been sustained, both in England and in our States, where nothing of this sort is even approximated, as the reader will see who consults the cases referred to at the end of this formula. Even less of particularization than is given in the formula, as above, has in various cases fully satisfied the courts. Still, as a practical question for pleaders who wish to be safe, and at the same time avoid unseemly surplusage, I should not advise either less or more than the substantial following of the averments in the text, except in deference to an actual decision in one's own State.

[2] To be employed only where the offence is felony.

[3] For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 852–855, 858, 861, 864 ; 2 Chit. Crim. Law, 158–219, 297, 493 ; 4 Went. Pl. 305–308, 313 ; Rex *v.* Blake, Trem. P. C. 194 ; Rex *v.* Glover, Trem. P. C. 244 ; Rex *v.* Lock, Trem. P. C. 248 ; Rex *v.* Bootie, 2 Bur. 864 ; Rex *v.* Greeniff, 1 Leach, 4th ed. 363 ; Rex *v.* Tilley, 2 Leach, 4th ed. 662 ; Rex *v.* Stanley, Russ. & Ry. 432 ; Rex *v.* Haswell, Russ. & Ry. 458 ; Rex *v.* Watson, Russ. & Ry. 468 ; Rex *v.* Fitzpatrick, Russ. & Ry. 512 ; Rex *v.* Shaw, Russ. & Ry. 526 ; Holloway *v.* Reg. 17 Q. B. 317, 2 Den. C. C. 287, 296 ; Shaw's Case, 1 Lewin, 280 ; Reg. *v.* Horne, 4 Cox C. C. 263 ; Galliard *v.* Laxton, 9 Cox C. C. 127, 129 ; Reg. *v.* Meany, Jebb, 249, 251.

Alabama. — Kyle *v.* The State, 10 Ala. 236 ; Kavanaugh *v.* The State, 41 Ala. 399 ; Ramsey *v.* The State, 43 Ala. 404.

Arkansas. — Hughes *v.* The State, 1 Eng. 131 ; The State *v.* Murphy, 5 Eng. 74 ; Bass *v.* The State, 29 Ark. 142 ; Martin *v.* The State, 32 Ark. 124 ; Griffin *v.* The State, 37 Ark. 437, 439.

Connecticut. — The State *v.* Howard, 6 Conn. 475 ; The State *v.* Doud, 7 Conn. 384.

Georgia. — Perry *v.* The State, 63 Ga. 402.

Indiana. — Gunyon *v.* The State, 68 Ind. 79 ; The State *v.* Sparks, 78 Ind. 166.

Kansas. — The State *v.* Hollon, 22 Kan. 580.

Kentucky. — Hudgens *v.* Commonwealth, 2 Duv. 239, 241 ; Tully *v.* Commonwealth, 11 Bush, 154, 156 ; Tully *v.* Commonwealth, 13 Bush, 142, 148.

Massachusetts. — Commonwealth *v.* Homer, 5 Met. 555 ; Commonwealth *v.* Filburn, 119 Mass. 297 ; Commonwealth *v.* Malloy, 119 Mass. 347.

Missouri. — The State *v.* Hayes, 24 Misso. 358 ; The State *v.* Hilton, 26 Misso. 199.

North Carolina. — The State *v.* Morrison, 2 Ire. 9 ; The State *v.* Lewis, 1 Winst. 307 ; The State *v.* Baldwin, 80 N. C. 390.

Texas. — White *v.* The State, 13 Texas 133 ; Hateh *v.* The State, 10 Texas Ap. 515.

[4] This suggestion of averring the jurisdiction is made by way of caution, in the

&c.];[1] whereupon he the said A did then and there wilfully, unlawfully, and feloniously,[2] from and out of said prison [against the will and without the license of the keeper thereof[3]], escape and go at large; against the peace, &c.[4]

§ 892. **Against Prisoner for Breaking, &c.** — It is good to allege, —

That A, &c. on, &c. at, &c. was undergoing, &c. [setting out the imprisonment as at ante, § 890, 891]; whereupon he the said A did then and there unlawfully, wilfully, and feloniously[5] break the said prison, by then and there cutting and sawing two iron bars parcel thereof, and breaking, cutting, and removing a great quantity of stone parcel of the wall thereof [*or*, &c. specifying the breaking according to any other fact], by means of which breaking of the said prison the said A did then and there escape therefrom and go at large [*or*, with intent, by means of said breaking, to escape from said prison and go at large]; against the peace, &c.[6]

§ 893. **Against Third Person Rescuing or Helping to Escape.**[7] — The indictment for this offence will vary with the special facts; and, if on a statute, with the statutory terms. It may charge, —

That on, &c. at, &c. X was undergoing lawful imprisonment, &c. [setting it out as at ante, § 890, 891]; whereupon A, &c. did then and there, well knowing these premises, and with the intent that the said X should elude justice and escape out of the said prison and go at large, unlawfully [and feloniously] break open the door [*or* break down the wall, *or*, &c. according to the fact] of the said prison [a complete offence is now charged,

absence of authorities on the precise point. For the rule, see Crim. Proced. I. § 236–239. But because the sentence is averred merely by way of inducement, and for other reasons, I doubt the necessity, in strict law, of following this suggestion.

[1] In the form in The State *v.* Murphy, 5 Eng. 74, and in various others, the allegations thus far are more minute; but, it is believed, needlessly so. And see ante, § 890 and note.

[2] "Feloniously" to be omitted where the offence is misdemeanor.

[3] In one of the forms before me. It cannot be necessary; because, among other reasons, the consent of the keeper does not in law excuse the prisoner. Crim. Law, II. § 1104.

[4] Substantially after the indictment in The State *v.* Doud, 7 Conn. 384. And compare with the form in The State *v.* Murphy, supra; and Archb. Crim. Pl. & Ev. 10th ed. 552, 19th ed. 853. For other forms and precedents, see The State *v.* Hollon, 22 Kan. 580; Hudgens *v.* Commonwealth, 2 Duv. 239, 241; The State *v.* Howard, 6 Conn. 475; Reg. *v.* Meany, Jebb, 249, 251; 2 Chit. Crim. Law, 158.

[5] "Feloniously" to be used only where the offence is felony.

[6] In alleging the breaking, I have in a measure followed the form in Archb. Crim. Pl. & Ev. 19th ed. 855. The allegation of the imprisonment, in most of Archbold's forms, is needlessly minute, for which reason I have adhered more nearly to English and American precedents adjudged adequate, as given in the books of reports. See for further forms and precedents, 2 Chit. Crim. Law, 160, 163, 190; Rex *v.* Haswell, Russ. & Ry. 458; Commonwealth *v.* Homer, 5 Met. 555.

[7] Crim. Proced. II. § 945, 946.

while yet the pleader will add, if so are the facts], by reason whereof the said X did then and there escape out of said prison and go at large [*or*, after this general manner, setting out the case as the facts are, and, if on a statute, covering the statutory terms]; against the peace, &c.[1]

§ 894. **Under Statute — (Conveying Instruments).** — Under various statutes, the indictment may depart more or less from the foregoing models; at least, if the pleader chooses. Thus, where the words are "shall, by any means whatever, aid and assist any prisoner to escape, or in attempting to escape, from any prison," it has been deemed not necessary to set out the means.[2] Still the pleader is at liberty to do so if he chooses, and it may be practically best he should. Averments good under these or more specific words are, as given in the English books, in substance, —

That on, &c. at, &c. one X was a prisoner in the common jail in the county of M, and A, &c. did then and there, while the said X was such prisoner therein, with intent to facilitate the escape of the said X from and out of the said common jail, feloniously convey into the said common jail two steel files; against the peace, &c.[3]

§ 895. **Against Officer permitting Escape.** — Negligent and voluntary escapes, suffered by the officer having the custody of an arrested or imprisoned person, differ in the intensity of the wrong;[4] but the structure of the indictment is substantially the same in both.[5] It may aver, —

[1] For forms and precedents, see 2 Chit. Crim. Law, 165–171, 182–200, 493; 4 Went. Pl. 305, 306, 313; Rex *v.* Blake, Trem. P. C. 194; Holloway *v.* Reg. 2 Den. C. C. 287, 17 Q. B. 317; Rex *v.* Greeniff, 1 Leach, 4th ed. 363; Rex *v.* Tilley, 2 Leach, 4th ed. 662; Rex *v.* Stanley, Russ. & Ry. 432; Rex *v.* Shaw, Russ. & Ry. 526; Shaw's Case, 1 Lewin, 280; Galliard *v.* Laxton, 9 Cox C. C. 127, 129.

Alabama. — Kyle *v.* The State, 10 Ala. 236; Ramsey *v.* The State, 43 Ala. 404.

Arkansas. — Hughes *v.* The State, 1 Eng. 131.

Georgia. — Perry *v.* The State, 63 Ga. 402.

Indiana. — Gunyon *v.* The State, 68 Ind. 79.

Kentucky. — Tully *v.* Commonwealth, 11 Bush, 154, 156; Tully *v.* Commonwealth, 13 Bush, 142, 148.

Massachusetts. — Commonwealth *v.* Filburn, 119 Mass. 297; Commonwealth *v.* Malloy, 119 Mass. 347.

Missouri. — The State *v.* Hayes, 24 Misso. 358; The State *v.* Hilton, 26 Misso. 199.

North Carolina. — The State *v.* Morrison, 2 Ire. 9; The State *v.* Lewis, 1 Winst. 307.

Texas. — White *v.* The State, 13 Texas, 133.

[2] Holloway *v.* Reg. 2 Den. C. C. 287, 296, 17 Q. B. 317; 4 Geo. 4, c. 64, § 43.

[3] Archb. Crim. Pl. & Ev. 19th ed. 858; Holloway *v.* Reg. supra. And compare with Shaw's Case, 1 Lewin, 280. See also Crim. Proced. II. § 945.

[4] Crim. Law, I. § 316, 321; II. § 1099, 1100.

[5] As to how it should be, see Crim. Proced. II. § 941 and note.

That on, &c. at, &c. A, &c. being the keeper of the common jail of the county of, &c. [*or*, being the sheriff of the county of, &c. *or* being one of the constables of the town of, &c.], had then and there in his lawful and official custody one X, &c. [proceeding as at ante, § 890, 891]; whereupon the said A [well knowing the premises, and well knowing that the said X was not then and there entitled to be discharged from and out of the said custody of the said A [1]], did then and there [feloniously [2]] voluntarily and contemptuously permit and suffer the said X to escape from and out of the aforesaid custody of him the said A, and go at large whithersoever he the said X would [*or*, in the case of a mere attempt, did, with the intent that the said X should escape from and out of the aforesaid custody and go at large, then and there voluntarily and contemptuously unlock the door of a certain cell wherein the said X was then confined, and the other doors of said prison (*or*, &c. stating any other sufficient overt act); *or*, in a case of negligent escape, did then and there unlawfully and negligently permit the said X to escape and go at large out of and from the aforesaid custody of him the said A]; against the peace, &c.[3]

§ 896. **Another.** — A form for negligent escape, held in one of our States to be good at the common law, is, in substance, omitting some obvious surplusage, —

That at [a term and court named], one X, charged with the murder of one Y, was duly committed to the care and custody of A, &c. who was then and still is the keeper of the common jail of and in said county, to be in said common jail imprisoned until further proceedings had in pursuance of law; and afterward, while the said X was and remained in the said care and custody in the said common jail, the said A did there, as the keeper of said common jail, on, &c. unlawfully, negligently, and contemptuously permit and suffer him the said X to escape therefrom and go at large whithersoever he would; against the peace, &c.[4]

§ 897. **On Statute.** — A statute having made it punishable "if any officer or his under officer or deputy, having the lawful custody of any prisoner, for any cause whatever shall voluntarily suffer or permit, or connive at, the escape of such prisoner from

[1] I introduce this matter for the convenience of any pleader who may deem it important. It is not generally in these precedents; nor, in principle, does it seem essential to a *prima facie* case. The reasons in ante, § 893, are different.

[2] To be employed where the offence is felony.

[3] For precedents and other forms, see Archb. Crim. Pl. & Ev. 10th ed. 550, 551, 19th ed. 852, 854; 2 Chit. Crim. Law, 171–182, 297; Rex *v.* Glover, Trem. P. C. 244; Rex *v.* Manlove, Trem. P. C. 246; Rex *v.* Bootie, 2 Bur. 864.

Alabama. — Kavanaugh *v.* The State, 41 Ala. 399.

Arkansas. — Bass *v.* The State, 29 Ark. 142; Martin *v.* The State, 32 Ark. 124; Griffin *v.* The State, 37 Ark. 437, 439.

Indiana. — The State *v.* Sparks, 78 Ind. 166.

North Carolina. — The State *v.* Baldwin, 80 N. C. 390.

[4] The State *v.* Baldwin, 80 N. C. 390.

his custody, or permit him to go at large," averments adjudged good were in substance, —

That A, &c. on, &c. at, &c. being the sheriff of said county, and having the lawful custody of one X, who had been convicted by the Circuit Court in and for said county at [a specified term thereof] of the crime of, &c. and adjudged to pay a fine of ten dollars with costs of prosecution, which said fine and costs remained on said first-mentioned day unpaid, did unlawfully on said first-mentioned day there voluntarily permit the said X to escape and go at large from and out of the said custody of the said A; against the peace, &c.[1]

§ 898. **Other Forms** — may occasionally be required,[2] but none which the foregoing will not furnish analogies for drawing.[3]

[1] Griffin *v.* The State, 37 Ark. 437, 439.

[2] See, for conveying a person escaped from the custody of the sergeant-at-arms, into parts beyond the sea, Rex *v.* Lock, Trem. P. C. 248. Returning or being at large after transportation, Reg. *v.* Horne, 4 Cox C. C. 263; Rex *v.* Watson, Russ. & Ry. 468; Rex *v.* Fitzpatrick, Russ. & Ry. 512.

[3] **Prisoner at Large.** — The steps by which a prisoner who has escaped, or is otherwise at large, is to be restored to confinement, are explained in Crim. Proced. I. § 1382–1386. And see, for forms, Haggerty *v.* People, 6 Lans. 332. Though, in 53 N. Y. 476, this case was overruled on grounds which seem special to New York, I do not understand that the forms are, therefore, to be deemed ill in localities where the proceeding itself is allowed.

CHAPTER LXXI.

PRIZE-FIGHTING.[1]

§ 899. **Assault — Affray — Riot, &c.** — A prize-fight may be an assault and battery, and as such it is perhaps oftenest prosecuted.[2] Or it may be an affray,[3] or a riot, or unlawful assembly.[4] Its consideration in these aspects is for the other titles, not this.

§ 900. **Statute and Indictment.** — A statute and form of indictment upon it are given in another connection.[5]

§ 901. **Present, &c.** — Under a provision to punish one "who shall be present at such [by previous appointment and arrangement] fight, as an aid, second, or surgeon, or who shall advise, encourage, or promote such fight," the allegations may be, —

That A, &c. on, &c. at, &c. was present as an aid and second at, and did advise, encourage, and promote, a fight in which one X did then and there, by previous appointment and arrangement, meet and engage with one Y; against the peace, &c.[6]

§ 902. **Leaving State, &c.** — Under a statute to punish an inhabitant of this State who, "by previous appointment or engagement made therein, leaves the State and engages in a fight with another person without the limits thereof," it is good to aver, —

That A, &c. on, &c. at, &c. did, being an inhabitant of this State, by previous appointment and engagement made therein, unlawfully leave this State and engage in a fight with one X, at N, in the State of M; against the peace, &c.[7]

[1] Crim. Law, I. § 260, note, 535, 632; II. § 35; Crim. Proced. II. § 24, 61; ante, § 222.

[2] Ante, § 222; Reg. *v.* Coney, 8 Q. B. D. 534, 15 Cox C. C. 46.

[3] Places referred to ante, § 222.

[4] Rex *v.* Perkins, 4 Car. & P. 537; Rex *v.* Billingham, 2 Car. & P. 234.

[5] Crim. Proced. II. § 24. For various precedents, see Commonwealth *v.* Welsh, 7 Gray, 324; Commonwealth *v.* Mitchell, 7 Gray, 324; Commonwealth *v.* O'Baldwin, 103 Mass. 210; Commonwealth *v.* Barrett, 108 Mass. 302.

[6] Commonwealth *v.* Mitchell, 7 Gray, 324.

[7] Commonwealth *v.* Barrett, 108 Mass. 302. I have considerably abridged the form in the book; omitting, it is believed, nothing important.

CHAPTER LXXII.

RAPE AND CARNAL ABUSE OF CHILDREN.[1]

§ 903. **Precaution.** — Though the common-law indictment for rape is simple and uniform, the statutes against the carnal abuse of young girls, to be covered by the allegations for this branch of the offence, differ somewhat; and even rape proper, and the attempts to commit it and the carnal abuse, are, in some of the States, modified by differing enactments. Therefore the inexperienced pleader should not venture upon the drawing of any indictment within this title until he has laid before him and carefully examined the statutes of his own State.

§ 904. **Formula for Indictment.** — Subject to be varied with the differing terms of statutes, the averments may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], in and upon one X [ante, § 78, 79, *adding*, if, as in carnal abuse, the age is material, this matter in the statutory words; as, a female child under the age of ten years], violently and feloniously did make an assault, and her the said X then and there violently and against her will [2] feloniously did ravish and carnally know [so far, omitting the matter in brackets, a rape is charged; *or*, if the offence is carnal abuse, omit "violently," [3] and say, after "assault," and her the said X then and there feloniously did carnally know and abuse, *or*, if any other words better cover the statute, employ them; *or*, if the offence is attempt, add the allegation of a battery [4] or other overt

[1] For the direct expositions of these offences, with the pleading, evidence, and practice, see Crim. Law, II. § 1107–1136; Crim. Proced. II. § 947–979; Stat. Crimes, § 478–499. Incidental, Crim. Law, I. § 37, note, 259, 261, 373, 554, 736, 737, note, 746, 753, 762, 765, 766, 788, 795, 808, 935; II. § 56; Crim. Proced. I. § 335, 419, 431, 446, 479; II. § 6 *a*, 81, 82, 91; Stat. Crimes, § 211, 215, 318, 643, 660, 661, 663.

[2] See, on the question whether this expression should be "against her will" or "without her consent," Crim. Law, II. § 1111, 1114, 1115; Crim. Proced. II. § 949, 951; Stat. Crimes, § 480.

[3] Or, no harm will come from retaining this word.

[4] As, see ante, § 201 et seq. This addition, where the facts sustain it, is commonly prudent; but, in strict law, probably no more than an assault is necessary, unless the proceeding is on a statute which requires more.

act to that of assault, and, instead of charging the consummation of the carnal wrong, say, with intent then and there to, &c.]; against the peace, &c.[1]

[1] For precedents and other forms, see Archb. Crim. Pl. & Ev. 19th ed. 762, 766–768; 3 Chit. Crim. Law, 815–818; 4 Went. Pl. 73; 6 Ib. 368, 394; 6 Cox C. C. App. 42–46; Rex *v.* Audley, 3 Howell St. Tr. 401, 406; Rex *v.* Scott, Russ. & Ry. 415; Rex *v.* Folkes, 1 Moody, 354; Reg. *v.* Allen, 2 Moody, 179, 9 Car. & P. 521; Reg. *v.* Johnson, Leigh & C. 632, 10 Cox C. C. 114; Rex *v.* Gray, 7 Car. & P. 164; Reg. *v.* Martin, 9 Car. & P. 215; Reg. *v.* Crisham, Car. & M. 187; Reg. *v.* McGavaron, 3 Car. & K. 320, 6 Cox C. C. 64; Reg. *v.* Sweenie, 8 Cox C. C. 223; Reg. *v.* Nicholls, 10 Cox C. C. 476; Reg. *v.* Ryland, 11 Cox C. C. 101; Reg. *v.* Ratcliffe, 15 Cox C. C. 127; Reg. *v.* Oulaghan, Jebb, 270; Reg. *v.* Webster, 9 L. C. 196, 198.

Alabama. — Wetherby *v.* The State, 39 Ala. 702; Leoni *v.* The State, 44 Ala. 110; Johnson *v.* The State, 50 Ala. 456.

Arkansas. — Sullivant *v.* The State, 3 Eng. 400; Anderson *v.* The State, 34 Ark. 257.

California. — People *v.* Mills, 17 Cal. 276; People *v.* Burke, 34 Cal. 661; People *v.* O'Neil, 48 Cal. 257; People *v.* Girr, 53 Cal. 629.

Connecticut. — The State *v.* Wells, 31 Conn. 210.

Georgia. — Stephen *v.* The State, 11 Ga. 225; Joice *v.* The State, 53 Ga 50.

Indiana. — Weinzorpflin *v.* The State, 7 Blackf. 186; Whitney *v.* The State, 35 Ind. 503; Mills *v.* The State, 52 Ind. 187; Black *v.* The State, 57 Ind. 109; Richie *v.* The State, 58 Ind. 355; Batterson *v.* The State, 63 Ind. 531; Vance *v.* The State, 65 Ind. 460.

Iowa. — The State *v.* Newton, 44 Iowa, 45; The State *v.* Pennell, 56 Iowa, 29.

Kansas. — The State *v.* Ruth, 21 Kan. 583.

Louisiana. — The State *v.* Williams, 32 La. An. 335.

Maine. — The State *v.* Blake, 39 Maine, 322.

Massachusetts. — Commonwealth *v.* Lanigan, 2 Law Reporter (Bost.), 49; Commonwealth *v.* Hunt, 4 Pick. 252; Commonwealth *v.* Scannel, 11 Cush. 547; Commonwealth *v.* Sugland, 4 Gray, 7; Commonwealth *v.* Sullivan, 6 Gray, 477; Commonwealth *v.* Fogerty, 8 Gray, 489; Commonwealth *v.* Squires, 97 Mass. 59; Commonwealth *v.* Thompson, 116 Mass. 346.

Michigan. — People *v.* McDonald, 9 Mich. 150; People *v.* Lynch, 29 Mich. 274; Turner *v.* People, 33 Mich. 363, 374.

Minnesota. — O'Connell *v.* The State, 6 Minn. 279.

Missouri. — McComas *v.* The State, 11 Misso. 116; The State *v.* Anderson, 19 Misso. 241; The State *v.* Little, 67 Misso. 624; The State *v.* Hatfield, 72 Misso. 518; The State *v.* Meinhart, 73 Misso. 562; The State *v.* Warner, 74 Misso. 83, 84.

Nebraska. — Fisk *v.* The State, 9 Neb. 62, 63.

New York. — Gonghlemann *v.* People, 3 Parker C. C. 15; People *v.* Jackson, 3 Parker C. C. 391.

North Carolina. — The State *v.* Washington, 2 Murph. 100; The State *v.* Sam, 2 Dev. 567; The State *v.* Jesse, 2 Dev. & Bat. 297; The State *v.* Jesse, 3 Dev. & Bat. 98; The State *v.* Goings, 4 Dev. & Bat. 152; The State *v.* Farmer, 4 Ire. 224; The State *v.* Tom, 2 Jones, N. C. 414; The State *v.* Johnson, 67 N. C. 55; The State *v.* Durham, 72 N. C. 447; The State *v.* Scott, 72 N. C. 461; The State *v.* Saxton, 78 N. C. 564; The State *v.* Dancy, 83 N. C. 608.

Ohio. — O'Meara *v.* The State, 17 Ohio State, 515.

Pennsylvania. — Stout *v.* Commonwealth, 11 S. & R. 177; Mears *v.* Commonwealth, 2 Grant, Pa. 385.

Tennessee. — Williams *v.* The State, 8 Humph. 585; Nevills *v.* The State, 7 Coldw. 78; Dillard *v.* The State, 3 Heisk. 260; Hill *v.* The State, 3 Heisk. 317; Brown *v.* The State, 6 Baxter, 422.

Texas. — Davis *v.* The State, 42 Texas, 226; Williams *v.* The State, 1 Texas Ap. 90; Greenlee *v.* The State, 4 Texas Ap. 345, 346; Curry *v.* The State, 4 Texas Ap. 574, 576; Battle *v.* The State, 4 Texas Ap. 595; O'Rourke *v.* The State, 8 Texas Ap. 70; Elschlep *v.* The State, 11 Texas Ap. 301, 302; Sanford *v.* The State, 12

§ 905. **Rape — (Common Form with Surplusage).** — The older precedents in rape, even as late as when Chitty wrote, have the "instigated by the devil" clause,[1] together with the later surplusage. The present common form, from which more or less is occasionally omitted, is, —

That A, &c. on, &c. [with force and arms [2]], at, &c. in and upon one X [3] [in the peace of God and the State then and there being [4]], violently [5] and feloniously did make an assault,[6] and her the said X then and there [7] violently [8] and against her will [9] feloniously did ravish [10] and carnally know; [11] against the peace, &c.[12]

Texas Ap. 196; Brinster *v.* The State, 12 Texas Ap. 612; Cornelius *v.* The State, 13 Texas Ap. 349, 352.

Virginia. — Taylor *v.* Commonwealth, 20 Grat. 825; Christian *v.* Commonwealth, 23 Grat. 954; Lawrence *v.* Commonwealth, 30 Grat. 845.

[1] 3 Chit. Crim. Law, 815; Rex *v.* Audley, 3 Howell St. Tr. 401, 406. Unnecessary, ante, § 44.

[2] Needless. Ante, § 43.

[3] **Addition — Sex.** — No addition is required to a name, like this, of a third person. Ante, § 78. Nor, in rape, whether under the common law or on a statute, need it be averred that the person ravished was a woman. Crim. Proced. II. § 952. Still, needlessly, many of our American precedents mention the sex; and a part of the English ones have an addition — for example, "spinster" — denoting the sex. In reason, if the sex of the injured person should be mentioned, so also should be the defendant's, but nothing of the latter appears in any of the precedents.

[4] Unnecessary. Ante, § 47.

[5] **Violently — Forcibly.** — All the precedents have "violently," and the careful pleader will be likely to continue its use, though it seems to be unnecessary. Some of our statutes, which the indictment must cover, have "forcibly;" but violently is a good substitute. Crim. Proced. II. § 959.

[6] **Assault.** — The words "did make an assault" are, like "violently," in all the precedents, for which and other reasons the cautious pleader will retain them. Yet an indictment is good without them. Crim. Proced. II. § 955.

[7] **Then and There.** — The words "then and there," at this place, are common, perhaps universal, in the precedents. There are analogies from which their necessity would seem to follow, and others indicating the contrary. Crim. Proced. I. § 408, 409, 413; II. § 57. They are too easily written to justify the experiment of their omission.

[8] See preceding note.

[9] See ante, § 904, note.

[10] **Ravish.** — This word is indispensable. Crim. Proced. II. § 953; 1 Hale P. C. 632.

[11] **Carnally know.** — Not so certainly required, not being in the old statute on which our common law of rape is founded. Crim. Law, II. § 1111. Still they are in the precedents, and by some authorities apparently deemed necessary. 3 Chit. Crim. Law, 811, 812. In reason, they are not necessary. Yet, practically, I should retain them; and, where the indictment is on a statute having them, they are plainly indispensable.

[12] Archb. Crim. Pl. & Ev. 10th ed. 480; The State *v.* Farmer, 4 Ire. 224; The State *v.* Saxton, 78 N. C. 564; Commonwealth *v.* Fogerty, 8 Gray, 489. Still, the differing statutes and other causes have created some diversities; as to which, see and compare, —

Alabama. — Leoni *v.* The State, 44 Ala. 110.

Arkansas. — Anderson *v.* The State, 34 Ark. 257.

California. — People *v.* Burke, 34 Cal. 661.

Georgia. — Stephen *v.* The State, 11 Ga. 225; Joice *v.* The State, 53 Ga. 50.

Indiana. — Weinzorpflin *v.* The State, 7 Blackf. 186; Whitney *v.* The State, 35 Ind. 503; Mills *v.* The State, 52 Ind. 187; Black *v.* The State, 57 Ind. 109; Richie *v.*

§ 906. **Same on Statute — ("By Force").** — Where a statute defines the offence, or adds an element not in the unwritten law, the foregoing form should be varied to cover the interpreted statutory terms.[1] Nor, in prudence, though there may be permissible substitutes, is it practically well to employ them, and especially should not the pleader try experiments with what is doubtful. Thus, under a provision to punish one who "shall ravish and carnally know any female, of the age of ten years or more, by force and against her will,"[2] the word "violently" and the other words of the common-law indictment have been held both to supply[3] and not to supply[4] the statutory expression "by force," so as to permit its omission.[5] But no form ought to have been employed raising the question. The convenient and safe way would be simply to expand the common-law averments by the statutory phraseology, though it would be quite possible to construct what would be equally safe with less words; as, —

That A, &c. on, &c. at, &c. in and upon one X, a female of the age of ten years and more, violently and feloniously did make an assault, and her the said X then and there violently, by force, and against her will feloniously did ravish and carnally know; against the peace, &c.[6]

§ 907. **Carnal Abuse — (Under ten, &c.).** — The indictment for the carnal abuse of a female child differs from that for rape on

The State, 58 Ind. 355; Vance *v.* The State, 65 Ind. 460.

Iowa. — The State *v.* Pennell, 56 Iowa, 29.

Kansas. — The State *v.* Ruth, 21 Kan. 583.

Louisiana. — The State *v.* Williams, 32 La. An. 335.

Massachusetts. — Commonwealth *v.* Scannel, 11 Cush. 547; Commonwealth *v.* Sugland, 4 Gray, 7; Commonwealth *v.* Squires, 97 Mass. 59.

Michigan. — Turner *v.* People, 33 Mich. 363, 374.

Minnesota. — O'Connell *v.* The State, 6 Minn. 279.

Missouri. — The State *v.* Hatfield, 72 Misso. 518; The State *v.* Meinhart, 73 Misso. 562; The State *v.* Warner, 74 Misso. 83, 84.

New York. — Goughlemann *v.* People, 3 Parker C. C. 15; People *v.* Jackson, 3 Parker C. C. 391.

North Carolina. — The State *v.* Washington, 2 Murph. 100; The State *v.* Jesse, 2 Dev. & Bat. 297; The State *v.* Jesse, 3 Dev. & Bat. 98; The State *v.* Johnson, 67 N. C. 55; The State *v.* Durham, 72 N. C. 447.

Tennessee. — Hill *v.* The State, 3 Heisk. 317.

Texas. — Williams *v.* The State, 1 Texas Ap. 90; Elschlep *v.* The State, 11 Texas Ap. 301, 302; Cornelius *v.* The State, 13 Texas Ap. 349, 352.

Virginia. — Taylor *v.* Commonwealth, 20 Grat. 825.

[1] Ante, § 31, 32.

[2] Mass. R. S. c. 125, § 18.

[3] Commonwealth *v.* Fogerty, 8 Gray, 489.

[4] The State *v.* Blake, 39 Maine, 322.

[5] **Unlawfully.** — As to when the omission of the statutory "unlawfully" does not destroy the indictment, Weinzorpflin *v.* The State, 7 Blackf. 186.

[6] So, in the main, is the form in Commonwealth *v.* Fogerty, supra. And see, for other illustrations, cases cited in the note to the last section.

an adult, in permitting the omission of some of the common allegations for rape, and in requiring others, indicated by the statutory terms.[1] The statutes differ; so that the pleader can safely follow a printed form only after comparing it with the enactments in his own State. Under the words of 9 Geo. 4, c. 31, § 17, followed with more or less precision in many of our States, "shall unlawfully and carnally know and abuse any girl under the age of ten[2] years," the averments may be, —

That A, &c. on, &c. at, &c. in and upon one X, a girl[3] under the age of ten years, to wit, of the age of nine years,[4] feloniously did make an assault, and her the said X then and there feloniously did unlawfully and carnally know and abuse; against the peace, &c.[5]

§ 908. **Another.** — The pleader will vary this sort of form to suit his particular statute. For example, if the expression is "shall unlawfully and carnally know and abuse any female child under the age of ten years," he will employ the same words as the foregoing, except that he will substitute "female child" for "girl."[6]

§ 909. **Same between Ten and Twelve — (Felony — Misdemeanor).** — On the words "shall unlawfully and carnally know and abuse any girl, being above the age of ten years, and under the age of twelve years," the allegations will be similar, if the offence is, as in the other instance, felony. But if it is misdemeanor, "feloniously" will be omitted. And in either case the expression will be varied to cover the different statutory terms. Thus, if misdemeanor, —

[1] Stat. Crimes, § 483–491.

[2] The present English statute substitutes twelve for ten. 38 & 39 Vict. c. 94, § 3. Archb. Crim. Pl. & Ev. 19th ed. 767. And the age in our States varies.

[3] **Girl — Infant.** — The form in Archb. Crim. Pl. & Ev. 10th ed. 483, substitutes "infant" for the statutory "girl." So do various other precedents. But the 19th ed. of Archb. p. 767, employs, what is always in such cases better, the exact statutory word.

[4] **Age.** — To me, the words "to wit, of the age of nine years," seem quite useless. But this manner of allegation is so common in the precedents, both English and American, that I retain it, though I cannot suppose any pleader would deem it essential.

[5] Archb. 10th ed. ut sup. Similar is 3 Chit. Crim. Law, 815.

[6] Commonwealth *v.* Sullivan, 6 Gray, 477. For other forms on statutes like those in this section and the last, see Rex *v.* Scott, Russ. & Ry. 415; Reg. *v.* Nicholls, 10 Cox C. C. 476.

Alabama. — Johnson *v.* The State, 50 Ala. 456.

California. — People *v.* Mills, 17 Cal. 276.

Indiana. — Batterson *v.* The State, 63 Ind. 531.

North Carolina. — The State *v.* Goings, 4 Dev. & Bat. 152.

Texas. — Davis *v.* The State, 42 Texas, 226; O'Rourke *v.* The State, 8 Texas Ap. 70.

Virginia. — Lawrence *v.* Commonwealth, 30 Grat. 845.

That A, &c. on, &c. at, &c. in and upon one X, a girl above the age of ten years, and under the age of twelve years, to wit, of the age of eleven years,[1] unlawfully did make an assault, and her the said X then and there did unlawfully and carnally know and abuse; against the peace, &c.[2]

§ 910. **Assault with Intent.** — The indictment for assault, or assault and battery, with intent to commit a rape or carnal abuse, is within explanations already given.[3] The allegations, to be varied if on a statute to cover its terms,[4] may be, —

That A, &c. on, &c. at, &c. in and upon one X [*adding*, where the age is material,[5] a girl (*or* female child, employing the statutory expression) under the age of, &c.[6]] an assault did make, and her the said X then and there did beat, bruise, wound, and ill-treat [settings out which may be varied with the circumstances, as well as to cover statutory terms],[7] with intent her the said X violently and against her will feloniously to ravish and carnally know and carnally abuse;[8] against the peace, &c.[9]

[1] The observations ante, § 807, note, are equally applicable here.

[2] Archb. Crim. Pl. & Ev. 10th ed. 484. For other forms on this sort of statute, see 6 Cox C. C. App. 44, 45; Rex *v.* Miller, 6 Went. Pl. 368; Reg. *v.* Johnson, Leigh & C. 632, 10 Cox C. C. 114; Reg. *v.* Ryland, 11 Cox C. C. 101; Reg. *v.* Ratcliffe, 15 Cox C. C. 127.

[3] Ante, § 108–111, 205, 206, 217, 904.

[4] Stat. Crimes, § 492–498.

[5] Crim. Proced. II. § 82, 976.

[6] Ante, § 904, 907–909.

[7] Ante, § 201, 202, 206–209. Indiana, ante, § 205.

[8] Crim. Proced. II. § 82. In setting out the intent, I have employed an expression which, I think, will cover all cases in a way to satisfy all opinions; unless there is a relevant statute in terms not here contemplated. Still the intelligent pleader will often abridge or vary the expression.

[9] For forms and precedents, see Crim. Proced. II. § 81; 3 Chit. Crim. Law, 816, 817; 4 Went. Pl. 73; Rex *v.* Miller, 6 Went. Pl. 394; 6 Cox C. C. App. 42–46; Reg. *v.* Oulaghan, Jebb, 270.

Alabama. — Wetherby *v.* The State, 39 Ala. 702.

Arkansas. — Sullivant *v.* The State, 3 Eng. 400.

California. — People *v.* Girr, 53 Cal. 629; People *v.* O'Neil, 48 Cal. 257.

Connecticut. — The State *v.* Wells, 31 Conn. 210.

Iowa. — The State *v.* Newton, 44 Iowa, 45.

Maine. — The State *v.* Blake, 39 Maine, 322.

Massachusetts. — Commonwealth *v.* Lanigan, 2 Law Reporter (Bost.), 49; Commonwealth *v.* Hunt, 4 Pick. 252; Commonwealth *v.* Thompson, 116 Mass. 346.

Michigan. — People *v.* McDonald, 9 Mich. 150; People *v.* Lynch, 29 Mich. 274.

Missouri. — McComas *v.* The State, 11 Misso. 116; The State *v.* Anderson, 19 Misso. 241; The State *v.* Little, 67 Misso. 624.

Nebraska. — Fisk *v.* The State, 9 Neb. 62, 63.

North Carolina. — The State *v.* Sam, 2 Dev. 567; The State *v.* Tom, 2 Jones, N. C. 414; The State *v.* Scott, 72 N. C. 461; The State *v.* Dancy, 83 N. C. 608.

Ohio. — O'Meara *v.* The State, 17 Ohio State, 515.

Pennsylvania. — Stout *v.* Commonwealth, 11 S. & R. 177; Mears *v.* Commonwealth, 2 Grat. Pa. 385.

Tennessee. — Williams *v.* The State, 8 Humph. 585; Nevills *v.* The State, 7 Coldw. 78; Dillard *v.* The State, 3 Heisk. 260; Brown *v.* The State, 6 Baxter, 422.

Texas. — Greenlee *v.* The State, 4 Texas Ap. 345, 346; Curry *v.* The State, 4 Texas Ap. 574, 576; Battle *v.* The State, 4 Texas Ap. 595; Sanford *v.* The State, 12 Texas Ap. 196.

Virginia. — Christian *v.* Commonwealth, 23 Grat. 954.

§ 911. **Another — (Following Statute — "Actual Violence").** — The pleader should bear in mind the practical importance of following the statutory words, instead of seeking substitutes for them.[1] Where they were "shall, *with actual violence*, make an assault upon the body of any female, with intent to commit a rape," an indictment omitting "actual violence" was sustained, because of other words which were accepted as equivalents.[2] Still it would seem better — certainly, it is safer — to adhere to the statutory expression; and, if the pleader deems the particulars of the violence important, set them out also. Thus, —

That A, &c. on, &c. at, &c. did, with actual violence, make an assault upon the body of X [3] [*adding*, if the pleader is not now satisfied, and therein did then and there lay hold of her throat, thrust his handkerchief into her mouth, and throw her upon the ground; *or*, &c. stating the special fact [4]], with intent her the said X violently and against her will feloniously to ravish and carnally know [*or*, some would deem it sufficient to follow here the statutory words, and simply say, with intent feloniously [5] to commit upon her the said X a rape [6]]; against the peace, &c.[7]

§ 912. **Other Attempts.** — Though the common method of attempt to commit this offence is by assault and violence, it is not legally impossible there should be others.[8] Particularly, —

§ 913. **By Solicitation.** — Where it is felony to have carnal knowledge of a young girl with her consent, plainly, in reason, if the ordinary preliminary step toward it — namely, solicitation — is unsuccessfully made, the indictable attempt is committed.[9] But for this the forms already given will suffice.[10]

§ 914. **Present aiding.** — As explained elsewhere,[11] if the hus-

[1] Ante, § 906.

[2] The State *v.* Wells, 31 Conn. 210; Stat. Crimes, § 494.

[3] It is not necessary to add here, "a female;" or, as expressed in the form in the book, "a single woman." Ante, § 905, note. Still, it is often done, and some pleaders will choose to insert this sort of matter.

[4] This particularization is introduced by way of suggestion, but it does not seem to me necessary. For analogies, consult the forms referred to in the note to the last section.

[5] As the offence attempted is felony, though the attempt is misdemeanor, it seems to me best to introduce this word "feloniously," not saying whether or not it is indispensable.

[6] On the question of this form of the allegation, consult ante, § 100, 555, 558, 784; People *v.* Girr, 53 Cal. 629; Crim. Proced. II. § 81, 82, 91.

[7] Compare with The State *v.* Wells, supra. For another statute and form, see The State *v.* Newton, 44 Iowa, 45. And see the places referred to in the last section.

[8] For example, consult, as suggestive, Reg. *v.* Martin, 9 Car. & P. 215.

[9] Crim. Law, I. § 767–768 *d*, 772 *a*.

[10] Ante, § 105, 106, 195, 258, 611.

[11] Crim. Proced. II. § 6 *a*, 957.

band of the ravished woman, or if another woman, incapable of committing the offence personally, is present assisting the ravisher, it is practically the better way, though not legally necessary, to charge such person formally as principal in the second degree, not in the first; thus, —

That A, &c. [the principal of the first degree, setting out his offence as at ante, § 905, down to and including "carnally know"]; and that B, &c. feloniously was then and there present aiding, abetting, and assisting the said A to do and commit the said felony and rape; against the peace, &c.[1]

[1] See also for forms and precedents, ante, § 114, 115; Rex *v.* Audley, 3 Howell St. Tr. 401, 406; Rex *v.* Folkes, 1 Moody, 354; Reg. *v.* Crisham, Car. & M. 187.

For REAL ESTATE, see TRESPASS TO LANDS.
RECEIVER OF FELON, see ante, § 114, 118.

CHAPTER LXXIII.

RECEIVING STOLEN GOODS.[1]

§ 915. **Differing Statutes — (Caution).** — The pleader should bear in mind, that this is a statutory offence, even when viewed as accessorial to a common-law felony.[2] So that every indictment for it is on some statute, which, as in other like cases, must be covered by the allegations. And the caution, so often given under other titles, is repeated here, that, as the statutes of our States differ, no pleader should draw an indictment until he has laid before him those of his own State, and the decisions thereon of his own court.

§ 916. **Formula and Forms for Indictment.** — There are two methods of drawing the indictment; the one by first setting out the original larceny, and then charging the receiver substantially in the way common against the accessory after the fact.[3] And this is practised, not only when the receiver's offence is treated as accessorial, and both he and the thief are to be arrested and tried on the one indictment, but likewise where only the receiver is meant to be held for the substantive wrong. The other method is to charge simply the receiver's offending as substantive, without any setting out of the original stealing. The allegations, to be varied or enlarged with the terms of statutes, may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], one, &c. [proceeding as at ante, § 583, down to and including "carry away"]; and that B, &c. [ante, § 74–77], afterward, on, &c. at, &c. [ante, § 80], well know-

[1] For the direct expositions of the law of this offence, with the pleading, evidence, and practice, see Crim. Law, II. § 1137–1142 *a*; Crim. Proced. II. § 979 *a*–991 *a*. Incidental, Crim. Law, I. § 567, 694, 699, 785, 789, 974; II. § 327, 885; Crim. Proced. I. § 60 *a*, 431, 449, 481, 483, 556; II. § 747, 750; Stat. Crimes, § 345, 413.

[2] Crim. Law, II. § 1137; Crim. Proced. II. § 979 *a*.

[3] Ante, § 114, 118.

ing the said goods and chattels to have been so as aforesaid feloniously stolen, taken, and carried away,[1] did feloniously receive and have the same [*or*, what is commonly the better practical method where the prosecution is in fact against the receiver alone for a substantive offence, That B, &c. on, &c. at, &c. one cow, of the value of, &c. of the property of X (in like manner adding, as in larceny, all the other stolen articles with their ownership, and with their value when it will as of law affect the punishment[2]), then lately before feloniously stolen, taken, and carried away, did, well knowing the same to have been so feloniously stolen, taken, and carried away, feloniously receive[3] and have]; against the peace, &c. [ante, § 65–69].[4]

§ 917. **As to which.** — Nothing more than is thus set down is required for the ordinary case. But the pleader should carefully

[1] Crim. Proced. II. § 986, where it is seen that some statutes require also the allegation of a fraudulent intent.

[2] Crim. Proced. II. § 983–985.

[3] In some of our States it should be added from whom the articles were received. Crim. Proced. II. § 983.

[4] For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 472, 477–479; 3 Chit. Crim. Law, 988–991; 6 Cox C. C. App. 3, 4; Reg. *v.* Goldsmith, Law Rep. 2 C. C. 74, 12 Cox C. C. 479; Rex *v.* Morris, 1 Leach, 4th ed. 109; Rex *v.* Hyman, 2 Leach, 4th ed. 925; Rex *v.* Messingham, 1 Moody, 257; Reg. *v.* Wilson, 2 Moody, 52; Reg. *v.* Matthews, 1 Den. C. C. 596; Reg. *v.* Larkin, Dears. 365, 6 Cox C. C. 377; Reg. *v.* Frampton, Dears. & B. 585; Reg. *v.* Huntley, Bell C. C. 238, 8 Cox C. C. 260; Reg. *v.* Hughes, Bell C. C. 242, 245, 8 Cox C. C. 278, 280; Reg. *v.* Deer, Leigh & C. 240, 9 Cox C. C. 225; Reg. *v.* Heywood, Leigh & C. 451, 9 Cox C. C. 479; Reg. *v.* Beeton, Temp. & M. 87, 88, note, 2 Car. & K. 960; Reg. *v.* Rymes, 3 Car. & K. 326; Reg. *v.* Robinson, 4 Fost. & F. 43; Reg. *v.* Hancock, 14 Cox C. C. 119.

Alabama. — The State *v.* Murphy, 6 Ala. 845; Barber *v.* The State, 34 Ala. 213; Foster *v.* The State, 39 Ala. 229; Huggins *v.* The State, 41 Ala. 393; Sellers *v.* The State, 49 Ala. 357; Cohen *v.* The State, 50 Ala. 108.

California. — People *v.* Montejo, 18 Cal. 38; People *v.* Avila, 43 Cal. 196.

Georgia. — Bieber *v.* The State, 45 Ga. 569.

Illinois. — Jupitz *v.* People, 34 Ill. 516; Aldrich *v.* People, 101 Ill. 16, 18.

Indiana. — Kaufman *v.* The State, 49 Ind. 248.

Iowa. — The State *v.* Brannon, 50 Iowa, 372.

Maine. — The State *v.* McAloon, 40 Maine, 133.

Massachusetts. — Commonwealth *v.* Andrews, 2 Mass. 14, 409; Commonwealth *v.* Andrews, 3 Mass. 126; Dyer *v.* Commonwealth, 23 Pick. 402; Stevens *v.* Commonwealth, 6 Met. 241; O'Connell *v.* Commonwealth, 7 Met. 460; Commonwealth *v.* Lakeman, 5 Gray, 82; Commonwealth *v.* Adams, 7 Gray, 43; Commonwealth *v.* Cohen, 120 Mass. 198; Commonwealth *v.* Gateley, 126 Mass. 52.

Missouri. — The State *v.* Honig, 78 Misso. 249.

New York. — Hopkins *v.* People, 12 Wend. 76; People *v.* Stein, 1 Parker C. C. 202; Wills *v.* People, 3 Parker C. C. 473, 474; Cohen *v.* People, 5 Parker C. C. 330.

North Carolina. — The State *v.* Ives, 13 Ire. 338; The State *v.* Phelps, 65 N. C. 450.

South Carolina. — The State *v.* Counsil, Harper, 53.

Tennessee. — Swaggerty *v.* The State, 9 Yerg. 338; Hampton *v.* The State, 8 Humph. 69; Moulden *v.* The State, 5 Lea, 577.

Texas. — Nourse *v.* The State, 2 Texas Ap. 304.

Vermont. — The State *v.* S. L. 2 Tyler, 249.

consider the terms of his own statute; and, when necessary in order to cover them, vary the expression. No variety of forms given here would relieve him of this duty.

§ 918. **Receiving, &c. obtained by False Pretences.** — There are in England statutes, in substance adopted in some of our States, not only making the obtaining of goods by false pretences misdemeanor, but the receiving of them afterward a misdemeanor also. Must the indictment against the receiver specify the false pretences? There are English intimations that, while the omission to do this is not an available objection after verdict,[1] possibly it is if taken before.[2] On principle, such is not even possible; for the obtaining of the goods by the false pretences constitutes no part of the accusation against the defendant, and, though essential, is collateral and in the nature of inducement. So that it need not be set out with the minuteness required in the indictment for such original offence.[3] The allegations, to be varied as differing statutory terms require, may be, —

That A, &c. on, &c. at, &c. one silver tankard of the value of, &c. of the property of X, then lately before unlawfully, criminally, and knowingly obtained and taken fraudulently from the said X by means of certain indictable false pretences, did unlawfully receive and have, well knowing the same to have been so unlawfully, criminally, and knowingly obtained from the said X by means of said false pretences; against the peace, &c.[4]

[1] Crim. Proced. I. § 707 *a*.

[2] Reg. *v.* Goldsmith, Law Rep. 2 C. C. 74, 12 Cox C. C. 479.

[3] Crim. Proced. I. § 554–558.

[4] I have slightly varied the expressions from the English books. For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 477; Reg. *v.* Goldsmith, supra; Reg. *v.* Wilson, 2 Moody, 52; Reg. *v.* Rymes, 3 Car. & K. 326; Moulden *v.* The State, 5 Lea, 577.

CHAPTER LXXIV.

REFUSING OFFICE.[1]

§ 919. **Constable.** — Following in the main an English form we have, —

That A, &c. [ante, § 74–77] on, &c. at, &c. [ante, § 80], was an able-bodied man residing in said town, between the ages of, &c. and, &c. and duly qualified to execute the office of constable in and for said town; and that then and there he the said A, at a meeting, &c. was in due manner and form lawfully chosen, nominated, and appointed by the legal voters of said town to be one of the constables of and for the said town, for one year thence next following, to do and execute all and singular the things which belong to the office of constable; and that the said A afterward, then and there, had due notice thereof, and then and there was summoned and required to appear before, &c. on, &c. there on said last-mentioned day to take his oath for the due execution of the said office of constable for the said town, according to the duty of that office, and to take upon himself the said office. Nevertheless the said A, not regarding his duty in that behalf, but contriving and intending the due execution of justice to hinder and prevent, afterward, on the day and year last aforesaid, there, unlawfully, wilfully, obstinately, and contemptuously did refuse, and thence continually until the day of the finding of this indictment unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take his said oath for the due execution of the said office of constable, or in any wise to take upon himself and execute the said office; against the peace, &c. [ante, § 65–69].[2]

[1] For the law of this offence, with the pleading, practice, and evidence, see Crim. Law, I. § 246, 458; Crim. Proced. I. § 529; II. § 820, 821.

[2] Archb. Crim. Pl. & Ev. 10th ed. 669, 670. For other forms and precedents, for the refusal of various offices, see Ib. 19th ed. 999, 1001, 1002; 2 Chit. Crim. Law, 266–279; 4 Went. Pl. 332, 338, 349, 351; 6 Ib. 418, 421; 4 Cox C. C. App. 29; Rex *v.* King, Trem. P. C. 217; Rex *v.* Caslin, Trem. P. C. 219; Rex *v.* Bettesworth, Trem. P. C. 221. For refusing to take the oath of allegiance and supremacy, Rex *v.* Crook, 6 Howell St. Tr. 201, 212.

For REFUSING TO ASSIST OFFICER, see ante, § 844–847.

CHAPTER LXXV.

REGISTRY LAWS, VIOLATING.[1]

§ 920. **Conspiracy — Forgery — Larceny.** — In the laws against conspiracy, forgery, and larceny, especially forgery, we have the principal protection for our various public records. And —

Malfeasance in Office. — The false making up of a public record, by the recording officer, is a species of malfeasance in office.

§ 921. **Special Statutes.** — In addition to these provisions of the ordinary unwritten and written laws, some special enactments have been made, and the English books furnish forms for the indictment on them. It is not deemed best to proceed here further than simply refer to places where the forms may be found; since these statutes vary in our States, and not many are in exact terms with the English.

§ 922. **False Statement for Registry.** — One of the common derelictions, punishable by statute, is the making to the registering officer of false statements to be entered of record.[2]

§ 923. **Defacing** — parish register.[3]

[1] See Crim. Law, I. § 468; II. § 531, 550, 554, 555, 570, 785; Stat. Crimes, § 210, 809, 835; ante, § 297, 299.

[2] See forms for a false statement of or relating to the birth of a child, to be entered on the register, Reg. *v.* Dewitt, 4 Cox C. C. 49; Reg. *v.* Hotine, 9 Cox C. C. 146; 1 Cox C. C. App. 1. For causing a false entry to be made in a parish register relating to a baptism, 10 Cox C. C. App. 1. Making a false statement to be inserted in a marriage register, Reg. *v.* Brown, 1 Den. C. C. 291, 299, 2 Car. & K. 504, 3 Cox C. C. 127. Causing false entry to be made in a register of deeds, Reg. *v.* Mason, 2 Car. & K. 622. Physician making false entry in visitation book, 5 Cox C. C. App. 10.

[3] Reg. *v.* Bowen, 1 Den. C. C. 22, 1 Car. & K. 501.

For REGRATING, — see Crim. Law, I. § 518–529; Crim. Proced. II. § 348–350.
RELIGIOUS MEETINGS, see DISTURBING MEETINGS.
RESCUE, see PRISON BREACH, &c.
RESISTING ARREST, see ante, § 838–843.
REVENUE, see TAX AND OTHER REVENUE LAWS.
REVOLT, see ante, § 580.

CHAPTER LXXVI.

RIOT, ROUT, AFFRAY, UNLAWFUL ASSEMBLY.[1]

§ 924. **Affray.**[2] — There are some differences of opinion as to what the indictment for affray must charge;[3] but the most exacting courts cast no unreasonable burden upon the pleader. The offence includes, necessarily or commonly, an assault and battery; yet, by the general and perhaps universal opinion, there may be a good indictment for an affray which will not sustain a conviction for assault and battery, as not duly alleging them.[4] The judicious pleader, therefore, will insert this matter; so that, if the proofs of the higher offence fail, there may be a conviction for a lighter should it be duly established. Thus, —

§ 925. **Form for Affray.** — The allegations may be, —

That A, &c. [ante, § 74–77], and B, &c.[5] on, &c. at, &c. [ante, § 80], [being unlawfully assembled together and arrayed in a warlike manner[6]], did then and there, in a certain public highway [*or*, &c. setting out any other public place as at ante, § 493], to the terror of many and divers people there lawfully being, make an affray,[7] by then and there fighting together,[8] and therein each did then and there make an assault on and beat, bruise, wound, and ill-treat the other;[9] against the peace, &c. [ante, § 65–69].[10]

[1] For the direct exposition of these offences, with the pleading, practice, and evidence, see Affray, Crim. Law, II. § 1–7; Crim. Proced. II. § 16–30. Riot, Crim. Law, II. § 1143–1155; Crim. Proced. II. § 992–1000. Rout, Crim. Law, II. § 1183–1186; Crim. Proced. II. § 992. Unlawful Assembly, Crim. Law, II. § 1256–1259. Incidental, as to all, Crim. Law, I. § 422, 534, 535, 537, 540, 632, 637, 658, 795, 875; II. § 56, 226, 653–655, 691; Crim. Proced. I. § 166, 183, 464, 527, 1023, 1124; II. § 303; Stat. Crimes, § 298.

[2] Compare with ante, PRIZE-FIGHTING.

[3] Crim. Proced. II. § 16–23.

[4] Ib. II. § 25; Childs *v.* The State, 15 Ark. 204.

[5] There must be, at least, two defendants or guilty persons, Crim. Proced. II. § 16.

[6] In most of the precedents, but needless. Ib. II. § 22.

[7] This form, thus far, comprehends the substance of some English precedents; but a part or most of our courts hold it to be inadequate. Ib. § 16–21; The State *v.* Priddy, 4 Humph. 429; The State *v.* Woody, 2 Jones, N. C. 335.

[8] By all opinions, by this further allegation rendered adequate, Crim. Proced. ut sup.; what follows being added for the practical reason stated ante, § 924.

[9] Ante, § 222.

[10] Archb. Crim. Pl. & Ev. 19th ed. 906; 10 Cox C. C. App. 49, 50; Crown

§ 926. **Riot — Rout — Unlawful Assembly.** — Unlawful assembly, rout, riot, are three degrees of one offence; a rout being an unlawful assembly after it has taken a step toward, yet stopping short of, a riot.[1]

§ 927. **Unlawful Assembly.** — Practically, in most instances of unlawful assembly, the disturbance proceeds so far that the indictment is for riot; leaving the petit jury to convict the defendants of rout, or of unlawful assembly, if the proofs establish no more. And, as the purposes and circumstances of unlawful assemblies differ, so do the allegations in the precedents. For unlawful assembly only they may be, for example, —

That A, &c. B, &c. and C, &c.[2] together with one hundred and more other persons whose names are to the jurors unknown,[3] on, &c. at, &c. unlawfully, routously, riotously, and tumultuously did assemble and meet together to disturb the public peace, and, &c. [setting out the special unlawful object of the assembly;[4] as], to tear down and demolish the public jail of said county, and set free the prisoners therein confined [*or*, to hinder and obstruct the execution of a certain statute, specifying it, and adding pertinent particulars];[5] against the peace, &c.[6]

§ 928. **Rout.** — It is believed that the books contain no single precedent, or form of any sort, of the indictment for rout alone,

Cir. Comp. by Ry. 437; 4 Chit. Crim. Law, 4.

Arkansas. — Childs *v.* The State, 15 Ark. 204; The State *v.* Brewer, 33 Ark. 176.

Indiana. — The State *v.* Weekly, 29 Ind. 206.

Missouri. — The State *v.* Dunn, 73 Misso. 586.

North Carolina. — The State *v.* Allen, 4 Hawks, 356; The State *v.* Woody, 2 Jones, N. C. 335.

Tennessee. — Curlin *v.* The State, 4 Yerg. 143; Simpson *v.* The State, 5 Yerg. 356; The State *v.* Priddy, 4 Humph. 429; The State *v.* Heflin, 8 Humph. 84; Wilson *v.* The State, 3 Heisk. 278.

Texas. — The State *v.* Billingsley, 43 Texas, 93.

[1] Crim. Law, II. § 1183, 1184, 1257; Crim. Proced. II. § 995.

[2] There must be, at least, three guilty persons to constitute the offence. Crim. Law, II. § 1256. But, doubtless, where only one or two are known or arrested, rules similar to those in conspiracy apply. Crim. Proced. II. § 225.

[3] Probably, where three or more persons have been named, there is no legal necessity for adding an allegation of this sort. But it is common, varying with the special facts. In most instances, I should deem its insertion practically the better way. Compare with ante, § 285 and note, 305, 306.

[4] Crim. Law, II. § 1257.

[5] A precedent before me proceeds here: "And, being so assembled and gathered together, the said [defendants, &c.] then and there unlawfully, riotously, and tumultuously remained and continued together, making great noises and committing great violences and disturbances for the space of four hours," &c. 2 Chit. Crim. Law, 492. Doubtless matter of this sort, often found in the precedents, may in some circumstances be judicious, but I am not aware that it is by any authorities claimed to be essential.

[6] For forms and precedents, see 2 Chit. Crim. Law, 492, 507; Rex *v.* Haigh, 31 Howell St. Tr. 1092; Anonymous, Jebb, 155; Beatty *v.* Gilderbanks, 15 Cox C. C. 138; The State *v.* Edwards, 19 Misso. 674; and the part of the various indictments for riot which charges an unlawful assembly.

where no more is ostensibly meant. Yet any indictment for riot is such, if the overt acts set out are only sufficient in law to constitute rout; and, on any indictment for riot, the conviction will be for rout if the proofs are so. There is no need, therefore, to construct for this place a form specially for rout.

§ 929. **Riot.** — The indictment, to cover the law of the offence, must, after charging an unlawful assembly as just explained, set out the acts of the assembled persons, "actually accomplishing an object." The further test of the sufficiency of the acts, consequently of the allegations, is, that they amount to conduct "calculated to terrify others." [1] The result of which is, that there can be no one form of words for the indictment, but it will vary with the facts of the individual case. Thus, —

That A, &c. B, &c. C, &c. D, &c. and divers other persons whose names are to the jurors unknown, on, &c. at, &c. did unlawfully, routously, and riotously assemble and gather together to disturb the public peace; and, on being so as aforesaid congregated, in and upon one X did then and there unlawfully, routously, and riotously make an assault, and then and there unlawfully, routously, and riotously did beat, bruise, wound, and ill-treat the said X [2] [*or*, arming themselves with and carrying clubs, pistols, guns, and other offensive weapons, drums, fifes, banners, and other like things, did then and there unlawfully, routously, and riotously march and travel, and make and utter great and loud noises and threatenings, signifying, among other things, the purpose and intent of the said A, B, C, D, and their aforesaid associates unlawfully, routously, and riotously to beat and imprison sundry and many quiet and peaceable people and destroy their property; *or*, the dwelling-house of one X there, while he the said X, his wife, children, and divers other persons of his family were dwelling and actually present therein, did then and there unlawfully, routously, and riotously lay hold of, pull down, and destroy]; thereby then and there greatly terrifying, alarming,[3] and disturbing [not only the said X, *or* the said X and his said wife and family,[4] but also] many and all the good and peaceable people there and for a great distance around inhabiting, passing, and being; [5] against the peace, &c.[6]

[1] Crim. Law, II. § 1143; Crim. Proced. II. § 992, 993.

[2] Ante, § 201.

[3] Crim. Law, II. § 1147, 1148; Crim. Proced. II. § 997.

[4] To be employed where, as in a part of the instances above, the name of X has been introduced.

[5] **Public Place.** — An argument of some force could be made to show that the indictment should, as in affray, set out the place as public. And see and compare ante, § 782 and note. But such has not been the course of the precedents, nor do the books lay it down as an element in riot that the place be public. So the question may be deemed concluded by authority. Affray is a less heavy disturbance of the public order. Riot is an aggravated wrong, in the nature of nuisance, punishable wherever committed.

[6] For forms and precedents, see Archb.

§ 930. **Practical Suggestions.** — The foregoing expositions and forms, if consulted in connection with the other volumes of this series, and the statutes and decisions of one's own State, will give the practitioner all the help of which the nature of these offences admits. Still he should bear in mind that, the facts being widely diverse, in some degree changing, and so in each successive case in a measure new, his strength consists in a mastery of the principles which govern the subject, and a skilful adaptation of them to the facts of the special instance.

Crim. Pl. & Ev. 19th ed. 900, 902, 904; 2 Chit. Crim. Law, 58, 485–507; 4 Went. Pl. 150, 309, 311, 312, 400–405; 6 Cox C. C. App. 25, 35, 72, 73; 10 Ib. App. 49: Rex *v.* W. M. Trem. P. C. 180; Rex *v.* Wilts, Trem. P. C. 181; Rex *v.* Pilkington, Trem. P. C. 182; Rex *v.* Strode, Trem. P. C. 186; Rex *v.* Sherley, Trem. P. C. 178; Rex *v.* Pilkington, 9 Howell St. Tr. 187, 219; Rex *v.* Sacheverell, 10 Howell St. Tr. 30; Reg. *v.* Hathaway, 14 Howell St. Tr. 690; Rex *v.* Maskall, 21 Howell St. Tr. 653; Rex *v.* Bangor, 26 Howell St. Tr. 463; Rex *v.* Thanet, 27 Howell St. Tr. 822; Reg. *v.* Gulston, 2 Ld. Raym. 1210; Rex *v.* Scott, 3 Bur. 1262; Rex *v.* Royce, 4 Bur. 2073; Kershaw's Case, 1 Lewin, 218; Rex *v.* Hughes, 4 Car. & P. 373; Reg. *v.* Atkinson, 11 Cox C. C. 330.

Arkansas. — Roberts *v.* The State, 21 Ark. 183; The State *v.* Webster, 30 Ark. 166.

Georgia. — Holt *v.* The State, 38 Ga. 187; Durden *v.* The State, 52 Ga. 664.

Illinois. — Gould *v.* People, 89 Ill. 216; Logg *v.* People, 92 Ill. 598.

Indiana. — The State *v.* Dillard, 5 Blackf. 365; The State *v.* Scaggs, 6 Blackf. 37; Conwell *v.* The State, 3 Ind. 387; The State *v.* Voshall, 4 Ind. 589; The State *v.* Brown, 69 Ind. 95.

Maine. — The State *v.* Boies, 34 Maine, 235.

Massachusetts. — Commonwealth *v.* Twombly, Thacher Crim. Cas. 222; Commonwealth *v.* Runnels, 10 Mass. 518; Commonwealth *v.* Tracy, 5 Met. 536; Commonwealth *v.* Gibney, 2 Allen, 150.

Missouri. — The State *v.* McCourtney, 6 Misso. 649; McWaters *v.* The State, 10 Misso. 167.

New Hampshire. — The State *v.* Berritt, 17 N. H. 268; The State *v.* Russell, 45 N. H. 83.

North Carolina. — The State *v.* Martin, 3 Murph. 533; The State *v.* Sigmon, 70 N. C. 66.

United States. — District of Columbia. United States *v.* Stockwell, 4 Cranch C. C. 671; United States *v.* Fenwick, 4 Cranch C. C. 675.

For RIVER, see WAY.
ROAD, see WAY.

CHAPTER LXXVII.

ROBBERY.[1]

§ 931. **Elsewhere.** — Robbery being a larceny compounded with certain elements principally of violence,[2] the forms and expositions under the title "Larceny" should be consulted, and by the pleader laid before him as a part of this chapter.

§ 932. **How the Indictment.** — Therefore the indictment is simply the common-law one for larceny, with, interwoven into it, averments of the facts which elevate the offence to robbery. Such matter will be what the common law supplies, or what a statute has specified, according as the proceeding is on the one or the other; and, in either case, the terms of the law must be duly covered.[3] Yet we shall see, that, where it is on the common law, the ordinary forms cover those terms less exactly than might seem desirable. Thus, —

§ 933. **Formula and Forms.** — Following, for formula, the common-law precedents, with suggestions of expansions or variations to cover particular terms of the law, we have, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did [here is one of the places available for adding statutory aggravations; as, for example, on a certain highway there, *or* in the dwelling-house of one X there,[4] *or* being armed with a certain deadly weapon, to wit, a pistol loaded with gunpowder and ball], in and upon one X feloniously make an assault,[5] and him the said X did then and there feloniously put in bodily fear and danger of his life [*or*, &c. covering the elements of the offence by any more exact expression[6]], and one pocket handkerchief of the value of twenty-

[1] For the direct expositions of this offence, with the pleading, practice, and evidence, see Crim. Law, II. § 1156–1182; Crim. Proced. II. § 1001–1008. Incidental, Crim. Law, I. § 329, 358, 361, 438, 553, 566, 582, 635, 744, 748, 985, 1055, 1063, 1064; II. § 892; Crim. Proced. I. § 408, 409, 437, 488 *e*, 553, 1006, 1086; II. § 84, 85; Stat. Crimes, § 242, note, 320.

[2] Crim. Law, II. § 892, 1156.

[3] Crim. Proced. II. § 1002.

[4] Some of the precedents repeat this sort of matter at various places further on. 3 Chit. Crim. Law, 806, 807. The necessity for it seems, in principle, doubtful.

[5] Compare with ante, § 201, 205.

[6] Assault is an element nearly if not absolutely universal in robbery, for which

five cents, &c. [setting out all the stolen articles as in ordinary larceny], all of the property of the said X, from the person and against the will of the said X, then and there feloniously and violently did steal, take, and carry away; against the peace, &c. [ante, § 65–69].[1]

and other reasons one would choose always to allege it, even should he deem the drawing of a good indictment possible without. But actual fear, whatever we hold of constructive fear, is not essential; for example, violence, where no particle of fear is excited, will suffice. Crim. Law, II. § 1156, 1166–1176. Yet the standard form for the indictment is silent as to this sort of robbery, and makes the pleader always say, regardless of the fact, that the assaulted person was "put in bodily fear and danger of his life." There appears to be no technical rule requiring this averment contrary to the truth. Crim. Proced. II. § 1005. Yet no pleader can be blamed for choosing the safe and beaten path, instead of encountering dangers and possible disaster in a new road. For the aid of any who prefer danger and right to safety and wrong, the following, wherein, in order to meet the differing aspects of cases, more is set down than is essential to constitute the offence, is suggested: —

That A, &c. on, &c. at, &c. did feloniously make an assault on one X, and him the said X did then and there feloniously by violence overcome and put in fear, and from the person of him the said X did then and there feloniously and violently against his will steal, take, and carry away, of the property of the said X, one watch, of the value of fifty dollars; against the peace, &c.

[1] For forms and precedents, see Crim. Proced. II. § 1002; 3 Chit. Crim. Law, 806–810; 4 Went. Pl. 51; 6 Cox C. C. App. 18, 29; Rex *v.* Gascoigne, 1 Leach, 4th ed. 280; Rex *v.* Pelfryman, 2 Leach, 4th ed. 563; Rex *v.* Monteth, 2 Leach, 4th ed. 702; Reg. *v.* Reid, 2 Den. C. C. 88, 5 Cox C. C. 104; Reg. *v.* Mitchell, 2 Den. C. C. 468, Dears. 19, 3 Car. & K. 181, 5 Cox C. C. 541; Reg. *v.* Ferguson, Dears. 427, 6 Cox C. C. 454; Lennox's Case, 2 Lewin, 268; Rex *v.* Rogan, Jebb, 62; Reg. *v.* Huxley, Car. & M. 596; Reg. *v.* Jerrett, 22 U. C. Q. B. 499.

Alabama. — Crocker *v.* The State, 47 Ala. 53; Wesley *v.* The State, 61 Ala. 282.

Arkansas. — Clary *v.* The State, 33 Ark. 561, 562.

California. — People *v.* Vice, 21 Cal. 344; People *v.* Shuler, 28 Cal. 490; People *v.* Nelson, 56 Cal. 77.

Georgia. — Long *v.* The State, 12 Ga. 293; Stegar *v.* The State, 39 Ga. 583.

Illinois. — Conolly *v.* People, 3 Scam. 474, 478; Collins *v.* People, 39 Ill. 233.

Indiana. — Arnold *v.* The State, 52 Ind. 281; Shinn *v.* The State, 64 Ind. 13; Buntin *v.* The State, 68 Ind. 38; Davis *v.* The State, 69 Ind. 130; Dickinson *v.* The State, 70 Ind. 247, 250.

Iowa. — The State *v.* Carr, 43 Iowa, 418, 420.

Kansas. — The State *v.* Barnett, 3 Kan. 250, 252.

Louisiana. — The State *v.* Robinson, 29 La. An. 364.

Maryland. — Hollohan *v.* The State, 32 Md. 399.

Massachusetts. — Commonwealth *v.* Humphries, 7 Mass. 242; Commonwealth *v.* Martin, 17 Mass. 359; Commonwealth *v.* Gallagher, 6 Met. 565; Commonwealth *v.* Clifford, 8 Cush. 215; Commonwealth *v.* Sanborn, 14 Gray, 393; Commonweath *v.* Mowry, 11 Allen, 20; Commonwealth *v.* Griffiths, 126 Mass. 252.

Mississippi. — Greeson *v.* The State, 5 How. Missis. 33.

Missouri. — The State *v.* Davidson, 38 Misso. 374; The State *v.* Wall, 39 Misso. 532; The State *v.* Howerton, 59 Misso. 91.

Nevada. — The State *v.* Chapman, 6 Nev. 320.

New Hampshire. — The State *v.* Gorham, 55 N. H. 152.

New York. — Quinlan *v.* People, 6 Parker C. C. 9; People *v.* Hall, 6 Parker C. C. 642.

North Carolina. — The State *v.* John, 5 Jones, N. C. 163.

Tennessee. — The State *v.* Freels, 3 Humph. 228; Kit *v.* The State, 11 Humph. 167; McTigue *v.* The State, 4 Baxter, 313, 315.

Texas. — Bell *v.* The State, 1 Texas Ap. 598; Barnes *v.* The State, 9 Texas Ap. 128; Parker *v.* The State, 9 Texas Ap. 351, 352; Williams *v.* The State, 10 Texas

§ 934. **On Statutes.** — In a considerable proportion of our States the common-law form, as presented in the last section, sufficiently covers the statutory terms; and, in most of the others, the variations required to bring the allegations within the statute are obvious.[1] To illustrate, —

§ 935. **Being Armed, &c.** — A statute makes punishable one who "assaults another, and feloniously robs, steals, and takes from his person money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent if resisted to kill or maim the person robbed, or being so armed wounds or strikes the person robbed." Obviously the former part of this provision points to robbery as defined by the common law, and the latter creates an aggravation in the alternative. Therefore the pleader will naturally and properly follow the common-law form, and introduce the matter of aggravation at the place already indicated,[2] or at such other place as suits his convenience or taste. A form judicially sustained is, in substance, —

That A, &c. on, &c. at, &c. in and upon one X an assault did feloniously make, and him the said X in bodily fear and danger of his life did then and there feloniously put, and, &c. [setting out the things taken as in simple larceny], from the person and against the will of the said X, then and there by force and violence did feloniously rob, steal, take, and carry away; and that the said X was then and there armed with a certain dangerous weapon, to wit, metallic knuckles, and being so armed the said A then and there did strike and wound; against the peace, &c.[3]

§ 936. **Degrees.** — In a few of the States there are statutes creating degrees in robbery. Their terms are not quite uniform. And, as they are not of general prevalence, it will suffice simply to refer to places where precedents for the indictment may be found.[4]

§ 937. **Assault with Intent.** — It would be difficult to distinguish between an assault with intent to commit larceny from the

Ap. 8; Mathews *v.* The State, 10 Texas Ap. 279, 282; Scott *v.* The State, 12 Texas Ap. 31.

Virginia. — Hardy *v.* Commonwealth, 17 Grat. 592.

United States. — United States *v.* Terrel, Hemp. 411; United States *v.* Jackalow, 1 Black, 484, on high seas.

[1] See, for examples of forms on statutes, Conolly *v.* People, 3 Scam. 474, 478; Collins *v.* People, 39 Ill. 233.

[2] Ante, § 933.

[3] Commonwealth *v.* Mowry, 11 Allen, 20. And compare with Commonwealth *v.* Sanborn, 14 Gray, 393; Commonwealth *v.* Gallagher, 6 Met. 565.

[4] Quinlan *v.* People, 6 Parker C. C. 9; The State *v.* Howerton, 59 Misso. 91; The State *v.* Barnett, 3 Kan. 250, 252.

person, and an assault with intent to rob; because the actual stealing of valuables from the person by assault is robbery. The indictment, whether ostensibly for the one or the other, may charge, —

That A, &c. on, &c. at, &c. in and upon one X [then and there being[1]] feloniously[2] did make an assault, with intent the moneys, goods, and chattels of the said X, from the person and against the will of him the said X, then and there feloniously and violently to steal, take, and carry away; against the peace, &c.[3]

§ 938. **Practical Suggestions.** — The only difficulty which the pleader will encounter under this title will be in duly covering statutes the terms whereof differ from those of the common law. In this, he is required simply to exercise care. For methods, let him consult the suggestions in an early chapter.[4]

[1] In the form before me, but unnecessary. Ante, § 201, 582.

[2] "Feloniously" at this place, not where it occurs further on, to be omitted if the offence is not felony.

[3] Reg. *v.* Ferguson, Dears. 427, 6 Cox C. C. 454; Reg. *v.* Huxley, Car. & M. 596; Archb. Crim. Pl. & Ev. 19th ed. 458. The word "rob" is not necessary. Ib. For other forms and precedents, see 3 Chit. Crim. Law, 807, 809; 6 Cox C. C. App. 18, 29; Rex *v.* Monteth, 2 Leach, 4th ed. 702; The State *v.* Freels, 3 Humph. 228; Hollohan *v.* The State, 32 Md. 399; Commonwealth *v.* Gallagher, 6 Met. 565; Commonwealth *v.* Sanborn, 14 Gray, 393; Scott *v.* The State, 12 Texas Ap. 31. *Indiana.* — The peculiar manner of averring an assault in Indiana has already been explained. Ante, § 205. A form before me sets out the assault according to such method, and proceeds: "with intent forcibly and feloniously, by violence and putting him [X] in fear, to take from his person the goods and chattels of him the said X." Buntin *v.* The State, 68 Ind. 38. And see, for allegations more elaborate, Dickinson *v.* The State, 70 Ind. 247, 250.

[4] Ante, § 31–36.

For ROBBERY ON SEA, see PIRACY.
ROUT, see RIOT, &c.
SABBATH, see LORD'S DAY.
SCOLD, see COMMON SCOLD, ante, § 791, 792.
SECOND OFFENCE, see ante, § 91–97.

CHAPTER LXXVIII.

SEDITION.[1]

§ 939. **This Chapter — Elsewhere — (Libel).** — A form of indictment for libel on the government having already been given,[2] the sorts of sedition which remain for this chapter are, whether within our American law of crimes or not, such as in modern times are seldom brought into the courts. So it will suffice simply to refer to places where precedents of the indictment therefor may be found. Thus, —

§ 940. **By Oral Words.** — Indictments for every class of oral words[3] are less in repute and practice than formerly, whatever the strict law may now be. Precedents for seditious words appear at the places cited in the note.[4]

§ 941. **Seditious Conspiracies.** — Precedents of the indictment for these are referred to in the note.[5]

§ 942. **In Nature of Treason.** — The precedents cited to the last section are mostly of this sort. There are others.[6]

[1] Crim. Law, I. § 457 and note; ante, § 621.

[2] Ante, § 621.

[3] Ante, § 241, 243, 244, 632–635.

[4] 2 Chit. Crim. Law, 94–98; 3 Ib. 881; Rex *v.* Colemer, Trem. P. C. 58; Rex *v.* Snow, Trem. P. C. 59; Rex *v.* Edes, Trem. P. C. 61; Rex *v.* Wetwang, Trem. P. C. 64; Rex *v.* Sorocold, Trem. P. C. 64; Rex *v.* Harris, Trem. P. C. 65; Rex *v.* Harvey, Trem. P. C. 66; Rex *v.* Elliot, 3 Howell St. Tr. 293, 320; Rex *v.* Frost, 22 Howell St. Tr. 471; Rex *v.* Briellat, 22 Howell St. Tr. 909; Rex *v.* Binns, 26 Howell St. Tr. 595; Reg. *v.* O'Neill, 1 Car. & K. 138; In re Crowe, 3 Cox C. C. 123; Reg. *v.* Fussell, 3 Cox C. C. 291.

[5] Rex *v.* Hayes, Trem. P. C. 5; Rex *v.* Bradden, Trem. P. C. 35; Rex *v.* Hampden, Trem. P. C. 37; Rex *v.* Gerrard, Trem. P. C. 38; Rex *v.* Macclesfield, Trem. P. C. 39; Rex *v.* Trenchard, Trem. P. C. 40; Rex *v.* Wildman, Trem. P. C. 43; Rex *v.* Walker, 23 Howell St. Tr. 1055, 1078; Rex *v.* Redhead, 25 Howell St. Tr. 1003; Rex *v.* Hunt, 3 B. & Ald. 566; Reg. *v.* Vincent, 9 Car. & P. 91; Reg. *v.* Vincent, 9 Car. & P. 275; Reg. *v.* Shellard, 9 Car. & P. 277; Reg. *v.* Dowling, 3 Cox C. C. 509; to join the rebellion, Commonwealth *v.* Blackburn, 1 Duv. 4.

[6] Rex *v.* Hampden, 9 Howell St. Tr. 1054. In deposing a governor in India, Rex *v.* Stratton, 21 Howell St. Tr. 1045, 1049. Advancing money to assist rebellion, Rex *v.* Blake, Trem. P. C. 41. Giving aid to enemies of United States, People *v.* Lynch, 11 Johns. 549. Illegal military drill, &c. Presser *v.* People, 98 Ill. 406; Reg. *v.* Hunt, 3 Cox C. C. 215; Gogarty *v.* Reg. 3 Cox C. C. 306.

CHAPTER LXXIX.

SEDUCTION AND ABDUCTION OF WOMEN.[1]

§ 943. **Common Law and Statutes.** — For reasons explained in "Statutory Crimes," all our indictments for these offences are practically on the statutes of the respective States, whatever be the true view as to some old English enactments being, or not, common law with us.[2] Our statutes are in varying terms, nor do they present any clear line of demarcation between the two offences of seduction and abduction. There is nothing practical in the distinction, so no attempt will be made to preserve it in this chapter.

§ 944. **Formula for Indictment.** — It is not possible to construct a formula which, in any minute way, will serve as a guide on statutes so varying as these. But, subject to be modified and enlarged to cover the statutory terms, the allegations may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did unlawfully make an assault on one X [ante, § 79], a girl, &c. [*or*, &c. employing the statutory expression, and stating her age and whatever else the statute specifies], and, &c. [describing the defendant's further act in the statutory words; *or*, going further back, say, did unlawfully take, &c. from, &c. for the purpose, &c. *or* otherwise adhering to the statutory terms]; against the peace, &c. [ante, § 65–69].[3]

[1] For the direct expositions of these offences, with the pleading, evidence, and practice, see Stat. Crimes, § 614–652. Collateral, Crim. Law, I. § 555; Crim. Proced. I. § 54, 1106; II. § 244; Stat. Crimes, § 215, 715.

[2] Stat. Crimes, § 616–618, 622, 627–629.

[3] For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 756, 758, 761, 766; 3 Chit. Crim. Law, 818; 6 Cox C. C. App. 78, 97, 98; Rex *v.* Campbell, Trem. P. C. 34; Rex *v.* Aleway, Trem. P. C. 214; Rex *v.* Baxter, Trem. P. C. 265; Reg. *v.* Swendsen, 14 Howell St. Tr. 559; Reg. *v.* Baynton, 14 Howell St. Tr. 597; Reg. *v.* Timmins, Bell, 276, 8 Cox C. C. 401; Reg. *v.* Burrell, Leigh & C. 354, 355, note; Reg. *v.* Hopkins, Car. & M. 254; Reg. *v.* Meadows, 1 Car. & K. 399; Reg. *v.* Robins, 1 Car. & K. 456; Reg. *v.* Robb, 4 Fost. & F. 59; Reg. *v.* Biswell, 2 Cox C. C. 279; Reg. *v.* Mycock, 12 Cox C. C. 28; Rex *v.* Browne, Jebb, 21.

Arkansas. — Cheaney *v.* The State, 36 Ark. 74.

California. — People *v.* Roderigas, 49 Cal. 9.

Georgia. — Wood *v.* The State, 48

§ 945. **Taking out of Possession.** — On a provision to punish one who "shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her," [1] the allegations may be, —

That A, &c. on, &c. at, &c. unlawfully did take [and cause to be taken [2]] X out of the possession and against the will of Y her father, she the said X then and there being an unmarried girl, under the age of sixteen years, to wit, of the age of fifteen years; against the peace, &c.[3]

§ 946. **Seducing by Fraud.** — There is a statute making punishable one who "shall, by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years to have illicit carnal connection with any man." [4] The indictment, on terms like these, should follow the analogies of that on the statutes against cheating by false pretences.[6] Thus, —

That A, &c. on, &c. at, &c. did unlawfully and falsely pretend and represent to one X, a woman under the age of twenty-one years, that, &c. [setting out the false representations], whereas, in truth and in fact, &c. [negativing them as in false pretences]; by means of which false pretences and false representations, he the said A did then and there procure the said X to have illicit carnal intercourse with himself[6] [*or*, with one Y, *or*, with a man whose name is to the jurors unknown]; against the peace, &c.[7]

Ga. 192; Hopper *v.* The State, 54 Ga. 389.

Indiana. — Osborn *v.* The State, 52 Ind. 526; Callahan *v.* The State, 63 Ind. 198.

Iowa. — Andre *v.* The State, 5 Iowa, 389; The State *v.* Curran, 51 Iowa, 112.

Kansas. — The State *v.* Buffington, 20 Kan. 599.

Minnesota. — The State *v.* Gates, 27 Minn. 52.

New York. — Carpenter *v.* People, 8 Barb. 603; Crozier *v.* People, 1 Parker C. C. 453, 454; Grant *v.* People, 4 Parker C. C. 527; People *v.* Kenyon, 5 Parker C. C. 254; People *v.* Parshall, 6 Parker C. C. 129.

Pennsylvania. — Dinkey *v.* Commonwealth, 5 Harris, Pa. 126.

South Carolina. — The State *v.* Tidwell, 5 Strob. 1, 4.

Virginia. — Anderson *v.* Commonwealth, 5 Rand. 627.

Wisconsin. — West *v.* The State, 1 Wis. 209.

[1] The English 24 & 25 Vict. c. 100, § 55; Stat. Crimes, § 631.

[2] In the form before me; but, though harmless, it is quite as well omitted. Ante, § 139 and note, 621 and note, 764 and note.

[3] Stat. Crimes, § 644; Archb. Crim. Pl. & Ev. 10th ed. 477, 19th ed. 758; Reg. *v.* Robins, 1 Car. & K. 456; Reg. *v.* Biswell, 2 Cox C. C. 279; Rex *v.* Baxter, Trem. P. C. 265. Compare with ante, § 735.

[4] Eng. 24 & 25 Vict. c. 100, § 49.

[5] Ante, § 420.

[6] Stat. Crimes, § 642 *a*.

[7] Compare with Archb. Crim. Pl. & Ev. 19th ed. 766; Reg. *v.* Mears, 2 Den. C. C. 79, 4 Cox C. C. 423; 6 Cox C. C. App.

§ 947. **Married Man and Chaste Woman.** — On a statute making punishable "any unmarried man, who, under promise of marriage, or any married man, who shall seduce and have illicit connection with any unmarried female of previous chaste character," the allegations against the married man may be, —

That A, &c. on, &c. at, &c. being a married man, did then and there unlawfully seduce and have illicit connection with one X, who was then and there an unmarried female of previous chaste character; against the peace, &c.[1]

§ 948. **Seduce and Debauch.** — "If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished," &c. The indictment may aver, in the words of the statute, or not greatly expanding them, —

That A, &c. on, &c. at, &c. did unlawfully seduce, debauch, and carnally know one X, who was then and there an unmarried woman of previously chaste character; against the peace, &c.[2]

§ 949. **Under Marriage Promise.** — The terms of the statutes punishing seduction under promise of marriage differ, and the averments should vary with them. By one statute: "Any man who shall, under promise of marriage, seduce and have illicit connection with any unmarried female of previous chaste character shall be guilty of a misdemeanor."[3] On this the allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully, under and by means of a promise of marriage by him made to one X, who was then and there an unmarried female of previous chaste character, seduce and have illicit intercourse with her the said X; against the peace, &c.[4]

78. **House of Ill Fame.** — For enticing a female to a house of ill fame, see People *v.* Roderigas, 49 Cal. 9.

[1] West *v.* The State, 1 Wis. 209.

[2] Andre *v.* The State, 5 Iowa, 389; The State *v.* Curran, 51 Iowa, 112. So, in substance, are these precedents, adding "carnally know" to the statutory terms. The observations in the latter case strongly imply that this addition is unnecessary. Said Adams, J.: "The words 'seduce' and 'debauch,' when used in connection, do, we think, necessarily charge the offence. It cannot be said that they need, when used in connection, to be helped out by a legal conclusion. In their common as well as legal acceptation, they import the idea of illicit intercourse, accomplished by arts, promises, or deception, and have no other meaning." p. 113, 114. Still, as the statute, interpreted, requires an actual carnal commerce, I should prefer to retain "carnally know" in the allegation, even though I might deem that the court would sustain the indictment without these words. They make all certainly plain.

[3] Kenyon *v.* People, 26 N. Y. 203, 207.

[4] For precedents, see Crozier *v.* People, 1 Parker C. C. 453, 454; Grant *v.* People, 4 Parker C. C. 527; People *v.* Kenyon, 5 Parker C. C. 254. For a form under statutory words slightly different, see Callahan

§ 950. **Another.** — Where, by the statutory terms, the offence is committed by "any person" "obtaining carnal knowledge of any female by virtue of any feigned or pretended marriage, or of any false or feigned express promise of marriage," allegations adjudged good are, —

That A, &c. on, &c. at, &c. [being a single and unmarried man [1]], unlawfully [and feloniously [2]] did obtain carnal knowledge of one X, a [single and unmarried [3]] female, by virtue of a false express promise of marriage to her previously made by the said A; against the peace, &c.[4]

§ 951. **Other Forms** — may occasionally be required, but none for which the foregoing will not furnish ample analogies.[5]

v. The State, 63 Ind. 198. And see the form in Hopper *v.* The State, 54 Ga. 389.

[1] In the form before me. But, as the statute does not require the defendant to be unmarried, there is no just ground for supposing the allegation to be necessary. See Stat. Crimes, § 638.

[2] The pleader should avoid using this word "feloniously" unless the offence is in fact felony. It is misdemeanor in most of our States. I have not observed how it is in Arkansas.

[3] This expansion beyond the statutory words is simply less questionable than the former one. Evidently, if the woman is married, the offence becomes impossible; because the man's promise of a marriage which she knows cannot take place will be no inducement to the yielding up of her person. Stat. Crimes, § 638. Still, as the indictment is required only to set out a *prima facie* case (Crim. Proced. I. § 326), and the fact of the woman's marriage would be mere matter of defence, it is difficult to discern any necessity for thus negativing in allegation such defence.

[4] Cheaney *v.* The State, 36 Ark. 74.

[5] **In Violation of Trust.** — For a form for having carnal knowledge of a female child committed to the defendant's care, see The State *v.* Buffington, 20 Kan. 599.

CHAPTER LXXX.

SELF-MURDER.[1]

§ 952. **Principal of Second Degree.** — Though one who has committed suicide cannot be reached by legal process, another who stood by abetting him can be. The latter is subject to the same consequences as though the victim had been a third person.[2] The violence which the deceased inflicted on himself may be charged as done by the living accomplice, and the indictment need not differ from any ordinary one against a principal in the first degree for murder.[3] Perhaps this is the better method of laying the offence; but, as it may confuse an unlearned jury, some pleaders will choose to allege, according to the real fact, —

That A, late of, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], in and upon himself feloniously and of his malice aforethought did make an assault; and, with a certain knife which he the said A then and there had and held in his right hand, himself, in and upon the throat of him the said A, did then and there feloniously and of his malice aforethought strike and cut, then and there giving to himself, with the said knife, in and upon the throat, one mortal wound, of which said mortal wound the said A, from the said, &c. until, &c. then next following, at, &c. aforesaid, did languish, and languishing did live; and, on the day last aforesaid, at, &c. aforesaid, of the said mortal wound did die. And so the said A, in manner and form aforesaid,[4] feloniously and of his malice aforethought, and as a felon of himself, did kill and murder himself.[5] And that B, &c. [the defendant], on, &c. aforesaid [the day of inflicting the wound], at, &c. aforesaid, was feloniously and of his malice aforethought present, aiding, inciting, and abetting the said A to do and commit, in and upon himself, the said felony and murder; against the peace, &c. [ante, § 65–69].[6]

[1] For the direct expositions of this offence, see Crim. Law, II. § 1187. Incidental, I. § 259, 510, 511, 615, 652, 968.

[2] Ib. I. § 510, 511, 652; II. § 1187.

[3] Crim. Proced. II. § 3; ante, § 115. For precedents, see Rex *v.* Dyson, Russ. & Ry. 523; Reg. *v.* Alison, 8 Car. & P. 418. And see Commonwealth *v.* Bowen, 13 Mass. 356.

[4] Ante, § 520.

[5] This is, in substance, and omitting most of the surplusage, the form in Rex *v.* Sutton, 1 Saund. 269. And compare with ante, § 520.

[6] Ante, § 114, 115, 539.

§ 953. **Accessory Before.** — Under the unwritten law, the accessory before the fact — that is, one who advises to or procures the means for a suicide which is afterward committed in his absence — cannot be proceeded against.[1] But it is believed that, in some of our States, he is punishable by the terms or by the legal effect of statutes. Where he is, it will be a convenient method, though doubtless there will be others permissible,[2] to charge the act of the self-murdered person as in the last form; and, for what follows, substitute, —

And that B, &c. before the commission by the said A of the aforesaid felony and murder in and upon himself in manner and form aforesaid, did, on, &c. at, &c. feloniously and of his malice aforethought counsel, move, cause, and aid the said A the same in manner and form aforesaid to do and commit; against the peace, &c.[3]

§ 954. **Attempt.** — One's unsuccessful attempt at self-murder is generally understood to be an indictable misdemeanor at the common law, though it is not within every statute against attempted murder.[4] To charge simply that the defendant "did attempt," not further specifying his act, is not sufficient.[5] The allegations may be, —

That A, &c. on, &c. at, &c. did unlawfully, with a certain knife which he then and there had and held, make an assault on himself, and did then and there with said knife cut two several, deep gashes and wounds in and upon his throat, with the intent himself then and there feloniously and of his malice aforethought to kill and murder; against the peace, &c.[6]

[1] Crim. Law, I. § 652; II. § 1187.

[2] Ante, § 916.

[3] Ante, § 114, 116, 539. And compare with Commonwealth *v.* Bowen, 13 Mass. 356; Rex *v.* Russell, 1 Moody, 356.

[4] Crim. Law, II. § 1187.

[5] Crim. Proced. II. § 88. In Reg. *v.* Burgess, Leigh & C. 258, 9 Cox C. C. 247, the indictment did not satisfy this rule, and the conviction was affirmed. But the point was not raised. Certainly it would not generally with us be deemed good. It charged, —

That A, &c. on, &c. at, &c. unlawfully and wilfully did attempt and endeavor to commit a certain felony, that is to say, did then and there unlawfully and wilfully attempt and endeavor feloniously, wilfully, and of his malice aforethought to kill and murder himself the said A; against the peace, &c.

[6] And see, for another form, 5 Cox C. C. App. 92.

For SELLING ADULTERATED LIQUORS, see ante, § 771.
SELLING ADULTERATED MILK, see ante, § 770.
SELLING LIQUOR, see LIQUOR KEEPING AND SELLING.
SELLING UNWHOLESOME FOOD, see NOXIOUS AND ADULTERATED FOOD.

CHAPTER LXXXI.

SEPULTURE.[1]

§ 955. **Leaving Unburied.** — For the nuisance of rendering the air offensive by leaving unburied a dead body, in violation of the defendant's duty to bury it, the indictment may be constructed as already explained.[2]

§ 956. **Dissecting, instead of Burying.** — Where a dead body is sold or otherwise disposed of for dissection, there is commonly a conspiracy,[3] a prosecution for which may be more available than for the misdemeanor in any other form. Or the indictment at common law, following in substance a precedent from one of the reports, may be, —

That on, &c. at, &c. [ante, § 80], one X was publicly executed,[4] and then and there A, &c. [ante, § 74–77], an undertaker, was retained and employed by Y, the keeper of the jail in and for said county, on behalf of said county, to bury, for a certain reward to be thereafter paid him, the dead body of the said executed person; in pursuance whereof, the said dead body was then and there delivered to and received by the said A for the purpose aforesaid [and it then and there became the duty of the said A to bury the same accordingly [5]], but the said A [being an evil-disposed person, and of a most wicked and depraved disposition, and having no regard to his said duty, nor to religion, decency, morality, or the laws of this realm [6]], did not nor would bury the said body, but, on, &c. at, &c.

[1] For the law of this title, with the pleading, evidence, and practice, see Crim. Law, II. § 1188–1190; Crim. Proced. II. § 1009–1012. Incidental, Crim. Law, I. § 468, 506; II. § 228, 780; Stat. Crimes, § 156.

[2] Ante, § 810–816. And for a form see Reg. *v.* Vann, 2 Den. C. C. 325, 331, 5 Cox C. C. 379. For a form for preventing burial by usurping the office of coroner, see ante, § 848. For burying without notice to coroner, Ib., note.

[3] Ante, § 312, note; 2 Chit. Crim. Law, 36.

[4] I think I should prefer to add here "in the common jail there," or something of the sort; though it is not in the form before me, and is probably not necessary.

[5] In the form before me. It is one of those allegations of a conclusion of law which we have many times in this volume seen to be unnecessary. For example, ante, § 407, note.

[6] Unnecessary. Ante, § 45, 46.

unlawfully and wickedly [and for the sake of wicked lucre and gain[1]] did take and carry away the said dead body, and did sell and dispose of the same for the purpose of being dissected, cut to pieces, mangled, and destroyed; [to the great scandal and disgrace of religion, decency, and morality, in contempt of, &c. to the evil example of all other persons in like cases offending,[2] and] against the peace, &c. [ante, § 65–69].[3]

§ 957. **Disinterring — (At Common Law).** — Omitting from a common English form most of the surplusage, and otherwise adapting it to our use, we have, —

That A, &c. on, &c. at, &c. did unlawfully and wilfully break and enter a certain burying-ground [*or* graveyard, *or* churchyard, *or* cemetery, *or*, &c. employing the term appropriate to the particular place],[4] and did then and there unlawfully, wilfully, and indecently dig open the grave wherein the dead body of one X, deceased, had lately before been interred and then was, and said dead body, out of the grave aforesaid, unlawfully, wilfully, and indecently did take and carry away; against the peace, &c.[5]

§ 958. **On Statute.** — On the words, substantially affirming the common law, — "shall dig up, remove, or disturb the remains of any dead person interred within this State," — there is an approved form of the indictment essentially the same as that in the last section.[6] Nor, on other statutes, are any changes required which will not be obvious.[7]

[1] Needless. Ante, § 764, 781, 795, 798, and notes to all.

[2] Unnecessary. Ante, § 48; Crim. Proced. I. § 647.

[3] Rex *v.* Cundick, D. & R., N. P. 13. For other like forms, see 7 Cox C. C. App. 57; 4 Went. Pl. 219. Burning. — For burning a dead body instead of burying it, — held not to be indictable, if done in no indecent or offensive manner. Reg. *v.* Price, 15 Cox C. C. 389.

[4] Description of Place. — Within the principle appearing ante, § 183 and note, it is believed to be unnecessary to state the ownership of the burial-place. In one of the English precedents before me the expression is "the churchyard of and belonging to the parish church of the said parish, there situate;" in another, "a certain burial-ground belonging to a meeting-house of a congregation of Protestants dissenting from the Church of England;" and, in another, "a certain burial-ground in the parish of N in the county of M." With the last, the form in my text accords.

[5] Archb. Crim. Pl. & Ev. 10th ed. 665, 19th ed. 996; 2 Chit. Crim. Law, 35; Reg. *v.* Sharpe, Dears. & B. 160, 7 Cox C. C. 214; Reg. *v.* Jacobson, 14 Cox C. C. 522.

[6] See, for the form, The State *v.* Little, 1 Vt. 331.

[7] Precedents may be found in People *v.* Graves, 5 Parker C. C. 134; Commonwealth *v.* Slack, 19 Pick. 304; The State *v.* McClure, 4 Blackf. 328; People *v.* Dalton, 58 Cal. 226. And see McNamee *v.* People, 31 Mich. 473.

For SETTING FIRES, see ARSON, &c.
SHOP-BREAKING, see BURGLARY.
SHOWS, see ante, § 628–631, 798–801.
SLANDER, see LIBEL AND SLANDER.

CHAPTER LXXXII.

SLAVE-TRADE.[1]

§ 959. **In General.** — The abolition of slavery in this country does not abolish the offence of the slave-trade,[2] but it somewhat diminishes the probability of its commission. Cases of it were never common in our courts, and they are now not likely to occur otherwise than at wide intervals. Hence, —

§ 960. **How in these Volumes.** — In the other volumes of this series the cases are simply cited, so that the reader can find them should an emergency require, not discussed. Evidently nothing more, in a work so crowded with material, would have been judicious. And —

§ 961. **Forms.** — The reader will here be only referred, in a note, to places where some forms for the indictment may be found.[3]

[1] Crim. Law, I. § 564, note.

[2] R. S. of U. S. § 629, 1046, 5375–5382, 5551–5569.

[3] Fitting out a vessel for the slave-trade, Rex *v.* Zulueta, 1 Car. & K. 215 (a partial form). Aiding in fitting out, &c. United States *v.* Kelly, 25 Law Reporter (Bost.), 657. Bringing and importing slaves into the State, Commonwealth *v.* Young, 7 B. Monr. 1; The State *v.* Williams, 7 Rob. La. 252, 255.

For SLITTING THE NOSE, see ante, § 743.

CHAPTER LXXXIII.

SODOMY.[1]

§ 962. **How the Indictment.** — The indictment for this offence has come down to us from ancient times loaded with the common surplusage, yet otherwise in terms which, though in theory capable of some improvement, are not practically objectionable. It is recommended, therefore, to follow the ancient forms, omitting what is beyond question needless. The varieties are three, — where the offence is between two men, where between a man and woman contrary to nature, and where between a man and beast.

§ 963. **Forms.** — To copy almost literally from Chitty, yet with some regard to forms in other books, the allegations are, —

That A, &c. [ante, § 74–77], [not having the fear of God before his eyes, nor regarding the order of nature, but being moved and seduced by the instigation of the devil[2]], on, &c. [ante, § 80], [with force and arms[3]], at, &c. [ante, § 80], in and upon one X [a youth[4] about the age of seventeen years then and there being[5]] feloniously[6] did make an assault,[7] and then and there feloniously, wickedly, diabolically,[8] and against the order of nature had a venereal affair[9] with and carnally knew the said X [*adding*, if X was a woman, in the fundament of the said X], and then and there feloniously, wickedly, diabolically, and against the order of nature [*adding*, if X was a woman, in the fundament of the said X] with the said X did

[1] For the direct expositions of this offence, with the pleading, evidence, and practice, see Crim. Law, II. § 1191–1196; Crim. Proced. II. § 1013–1018 *a*. Incidental, Crim. Law, I. § 503, 767, 768 *b*, 768 *d*, 867; II. § 708; Stat. Crimes, § 242, 660.

[2] Needless. Ante, § 44, 45.

[3] Unnecessary. Ante, § 43.

[4] Chitty states that the word here, in Co. Ent. 351 *b*, is "male child."

[5] "Then and there being," not necessary within ante, § 582 and note. Nor, for various reasons, is any of the matter in these brackets. It does not appear in the forms in Archb. Crim. Pl. & Ev. 19th ed. 776; Reg. *v.* Allen, 1 Den. C. C. 364, 2 Car. & K. 869, 3 Cox C. C. 270; Lambertson *v.* People, 5 Parker C. C. 200.

[6] It is better to omit "feloniously" if the offence, which is commonly felony, is found in the particular State to be misdemeanor.

[7] I do not suppose this allegation of assault to be necessary, while yet for practical reasons I should retain it.

[8] Doubtless neither "wickedly" nor "diabolically" is essential.

[9] While the carnal knowledge should be alleged, it is plainly a mere repetition to say also that the defendant had a venereal affair. And it was adjudged to be needless in Lambertson *v.* People, supra.

commit and perpetrate the detestable and abominable crime of buggery [1] [not to be named among Christians [2]], [*or*, with a certain cow feloniously, &c. as above, had a certain venereal and carnal intercourse, and there feloniously, wickedly, diabolically, and against the order of nature carnally knew the said cow, and then and there feloniously, &c. with the said cow did commit and perpetrate that detestable, &c. as above]; [to the great displeasure of Almighty God, to the great scandal of all human kind [3]], against the peace, &c. [ante, § 65–69].[4]

§ 964. **Solicitation.** — For the form of attempt known as solicitation,[5] the allegations, following in some degree the precedent in Chitty, may be, —

That A, &c. on, &c. at, &c. [devising and intending as much as in him lay to vitiate and corrupt the morals of one X, and to stir up and excite in his mind filthy, lewd, and unchaste desires and inclinations [6]], did wickedly and unlawfully solicit and incite the said X to permit and suffer him the said A then and there feloniously and contrary to the order of nature carnally to know the said X, and commit on his person the detestable and abominable crime of buggery; against the peace, &c.[7]

§ 965. **Assault with Intent.** — The indictment may charge, —

That A, &c. on, &c. at, &c. in and upon one X an assault did make [*adding* a battery if the pleader chooses, as generally he will], with the intent the said X then and there [in her fundament, *if a woman*] contrary to the order of nature carnally to know, and then and there feloniously to commit with the said X the detestable and abominable crime of buggery; against the peace, &c.[8]

[1] At first impression, this allegation seems to be merely of law, therefore not necessary. But for reasons stated in Crim. Proced. II. § 1016, the word "buggery" is indispensable, and there is no adequate practical reason for departing, in the manner of introducing it, from ancient usage.

[2] In most of the precedents, even the modern ones, but evidently not necessary. It is not, for example, in Reg. *v.* Allen, supra, or Lambertson *v.* People, supra.

[3] The matter in these brackets is needless. It is within the principle of ante, § 44, 48.

[4] For forms and precedents, see Crim. Proced. II. § 1013; Archb. Crim. Pl. & Ev. 19th ed. 776; 2 Chit. Crim. Law, 48–51; Rex *v.* Wiseman, Fort. 91; Rex *v.* Audley, 3 Howell St. Tr. 401, 407; Reg. *v.* Allen, supra; Reg. *v.* Ransford, 13 Cox C. C. 9.

Maryland. — Davis *v.* The State, 3 Har. & J. 154.

New York. — Lambertson *v.* People, supra.

[5] Crim. Law, I. § 767, 768 *b*, 768 *d*, 772 *a*.

[6] I can discover no just ground for supposing that any of the matter in these brackets is essential, though I have no authorities on the point.

[7] 2 Chit. Crim. Law, 50. For a form where the solicitation was by letter, see Reg. *v.* Ransford, 13 Cox C. C. 9.

[8] For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 778; 2 Chit. Crim. Law, 50; Davis *v.* The State, 3 Har. & J 154.

For SOLICITATIONS, see ante, § 105–107.
SPIRITUOUS LIQUORS, see LIQUOR KEEPING AND SELLING.
STOLEN GOODS, see RECEIVING STOLEN GOODS.
STREETS, see WAY.

CHAPTER LXXXIV.

SUBORNATION OF PERJURY.[1]

§ 966. **Actual and Attempted.** — Soliciting one to commit perjury, where he refuses or from any other reason it is not committed, is an indictable attempt; where he commits it, the offence is subornation of perjury.[2] Hence, —

§ 967. **How the Indictment.** — The indictment for such attempt is simply a part of that for subornation. The pleader sets out the solicitation, thereby charging an attempt; then, if it was successful, he adds what elevates it to subornation. Thus, substantially to copy a standard precedent, —

§ 968. **Form for Indictment — (Both Solicitation and Subornation).** — The allegations may be, —

That heretofore, at, &c. [giving the name of the court, and the precedent before the author adds the term], a certain issue was joined between one X and one Y, in a certain plea of trespass and assault, in which the said X was plaintiff and the said Y defendant. And [the jurors aforesaid upon their oath aforesaid do further present[3]] that afterward and before the trial of the said issue as hereinafter mentioned[4] and whilst the same was depending, to wit, on, &c. at, &c. [ante, § 80], A, &c. [ante, § 74–77], [not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil[5]], [and wickedly contriving and intending to pervert the due course of law and justice, and wickedly and maliciously contriving and intending unjustly to aggrieve the said X, the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses[6]], unlawfully, corruptly, wickedly, and maliciously[7] did solicit,

[1] For the direct expositions of this offence, with the pleading, evidence, and practice, see Crim. Law, II. § 1197–1199; Crim. Proced. II. § 1019–1023. Incidental, Crim. Law, I. § 468, 974, 975; II. § 1055, 1056; Crim. Proced. II. § 75, 938, 939.

[2] Crim. Law, II. § 1056, 1197; Crim. Proced. II. § 1019, 1021.

[3] Needless, as at ante, § 875.

[4] On an indictment for the mere solicitation this expression will require to be modified.

[5] Unnecessary. Ante, § 44.

[6] Compare with ante, § 875 and note. No such specific intent as is alleged in these brackets is necessary to constitute in law the crime, hence its setting out is simply superfluous.

[7] Where the offence is felony, add here "feloniously."

suborn, instigate, and endeavor to persuade one Z [ante, § 79] to be and appear as a witness at the trial of the said issue, for and on behalf of the said Y the defendant in the said issue, and upon the said trial falsely to swear and give in evidence, to and before the jurors which should be sworn to try the issue aforesaid, certain matters material and relevant to the said issue, and to the matters therein and thereby put in issue, in substance and to the effect following, that is to say, that the said Y (meaning the defendant in the issue aforesaid) did, on a certain day then past, to wit, on the tenth day of April, in the year aforesaid, beat, wound, and bruise the said X (meaning the plaintiff in the issue aforesaid), and did knock him the said X down, and with a large stick did then and there beat, wound, and bruise, and greatly disfigure the said X whilst he was so down. [Thus far, we have a full setting out of the attempt by solicitation; if the consummated subornation of perjury is to be charged, the allegations proceed:] And [the jurors first aforesaid upon their oath aforesaid do further present,[1]] that afterward, to wit, at the sittings at, &c. [say when and where], the Honorable O, one of the justices of said court presiding, the issue aforesaid came on to be and was tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which said trial there, on the day last aforesaid, the said Z, in consequence and by the means, encouragement, and effect of the said wicked and corrupt subornation and procurement of the said A, did appear as a witness for and on behalf of the said Y the defendant in the plea above mentioned, and was duly sworn, and took his [corporal[2]] oath [upon the Holy Gospel of God[3]] before the said Honorable O, that the evidence which he the said Z should give to the court and jury there, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth, the said Honorable O, at the administering of said oath, having competent and sufficient authority therefor; and that, upon the trial of said issue, on the said last-mentioned day, it there became and was a material question whether the said Y so as aforesaid assaulted and beat the said X; whereupon the said Z did there during said trial, on said last-mentioned day, upon his oath aforesaid falsely, corruptly, and wilfully, before the said judge and jury, depose and swear (amongst other things) in substance and to the effect following, that is to say; that [here set out Z's evidence, in effect as above stated]; whereas, in truth and in fact, the said X did not, &c. [negativing the truth as at ante, § 871, 873 and note]; and whereas, in truth and in fact, the said A, at the time he so solicited, suborned, instigated, and endeavored to persuade the said Z falsely and corruptly to swear as aforesaid, well knew that, &c. [giving here also the proper denials]. [And so the jurors aforesaid upon their oath aforesaid do say, that the said A, on, &c. at, &c. aforesaid, did unlawfully,

[1] Needless, as at ante, § 875.

[2] This word is unnecessary, yet its insertion is not practically harmful. Crim. Proced. II. § 912, 913.

[3] Both unnecessary, and objectionable as requiring proof of the form of the oath. Ib.; ante, § 873, note.

corruptly, wickedly, and maliciously suborn and procure the said Z to commit wilful and corrupt perjury in and by his oath aforesaid, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said Honorable O, justice as aforesaid, the said Honorable O then and there having sufficient and competent power and authority to administer the said oath to the said Z; to the great displeasure of Almighty God, to the evil and pernicious example of all others in the like case offending,[1] and] against the peace, &c. [ante, § 65–69].[2]

§ 969. **As to which.** — The author, in transcribing this form, slightly abridged and likewise strengthened it. Still further condensation is practicable, but the necessity therefor is not urgent enough to justify a prolongation of the chapter.

[1] None of the matter in these brackets is necessary, as see ante, § 873 and notes.

[2] Archb. Crim. Pl. & Ev. 10th ed. 575–577, 19th ed. 885. For other forms and precedents, both for the solicitation and for the accomplished offence, see 2 Chit. Crim. Law, 475–484; 4 Went. Pl. 234, 250; Rex *v.* Hawkins, Trem. P. C. 167; Rex *v.* Margerum, Trem. P. C. 168; Rex *v.* Tasborough, Trem. P. C. 169; Rex *v.* Hickley, Trem. P. C. 171; Rex *v.* Hilton, Trem. P. C. 174; Rex *v.* Braddon, 9 Howell St. Tr. 1127.

Massachusetts. — Commonwealth *v.* Smith, 11 Allen, 243.

Texas. — Watson *v.* The State, 5 Texas Ap. 11, 21.

United States. — United States *v.* Dennee, 3 Woods, 39.

For SUBSEQUENT OFFENCE, see ante, § 91–97.
SUICIDE, see SELF-MURDER.
SUNDAY, see LORD'S DAY.
SWEARING, see BLASPHEMY AND PROFANENESS — PERJURY.

CHAPTER LXXXV.

TAX AND OTHER REVENUE LAWS.[1]

§ 970. **Elsewhere.** — Under the titles "Unlicensed Business" and some others, more or less may be found of what would be equally appropriate here.

§ 971. **Diversities — How this Chapter.** — The statutes creating offences against the revenue and taxation are so diverse and so numerous that full explanations, with forms, would consume much of our space to little profit. This chapter will undertake only what can be set down briefly.

§ 972. **Smuggling** — is the clandestine conveying of dutiable goods into or out of the country, in intentional evasion of the laws for the collection of revenue thereon.[2] For various expositions of this offence, and forms of the indictment therefor, the reader is referred to places cited in the note.[3]

§ 973. **Internal Revenue on Liquors — (Distilling — Not paying Tax, &c.).** — As to illicit distilling, withholding the tax on distilling, and the like;[4] working in a distillery on which there

[1] Crim. Law, I. § 351, 352, 486–488, 821, 824; II. § 225, 349; Crim. Proced. II. § 245, 407; Stat. Crimes, § 99, 120, 156, 195, 255, 856, 957, 991, 1098. Compare with the title UNLICENSED BUSINESS.

[2] See and compare Attorney-General *v.* Radloff, 10 Exch. 84; Rex *v.* Watts, 1 B. & Ad. 166; Holman *v.* Johnson, Cowp. 341; Waymell *v.* Reed, 5 T. R. 599; United States *v.* Claflin, 13 Blatch. 178; United States *v.* Thomas, 2 Abb. U. S. 114.

[3] Ib.; Archb. Crim. Pl. & Ev. 19th ed. 924–927; United States *v.* Nolton, 5 Blatch. 427; United States *v.* Cases of Books, 2 Bond, 271; United States *v.* Thomas, 4 Ben. 370; United States *v.* Bettilini, 1 Woods, 654; Reg. *v.* Anmond, 2 U. C. Q. B. 166; 4 Went. Pl. 434. Having in possession and concealing, 4 Went. Pl. 401, 447; 6 Ib. 3. And see United States *v.* Moller, 16 Blatch. 65; United States *v.* Cargo of Sugar, 3 Saw. 46.

[4] United States *v.* Simmons, 96 U. S. 360; United States *v.* Chaffee, 2 Bond, 110; United States *v.* Spirits, 4 Ben. 471; United States *v.* Fox, 1 Lowell, 199; United States *v.* Reed, 1 Lowell, 232; United States *v.* Boyden, 1 Lowell, 266; United States *v.* Frerichs, 16 Blatch. 547; United States *v.* Staton, 2 Flip. 319; United States *v.* Seventeen Empty Barrels, 3 Dil. 285.

is no sign ;[1] not making the proper entries in books ;[2] removing spirits from a warehouse,[3] and various other like offences,[4] see the cases cited in the notes.

§ 974. **Evading Tax.** — Various methods of evading taxation are sometimes made indictable ; as, not delivering to assessors a list of polls or of one's taxable property,[5] rendering a false list,[6] refusing to swear to the tax-list,[7] and obstructing the tax collector.[8] They are severally explained, with forms for the indictment, in the cases referred to in the notes.

§ 975. **Others.** — Also, in a note,[9] there are references to various other precedents which may occasionally be serviceable. It would not be profitable to spread out at large what will seldom be called for by the reader.

[1] United States *v.* Flynn, 15 Blatch. 302.

[2] United States *v.* Malone, 8 Ben. 574 ; United States *v.* Miller, 14 Blatch. 93 ; Fein *v.* United States, 1 Wy. Ter. 246.

[3] United States *v.* Harries, 2 Bond, 311 ; United States *v.* Smith, 2 Bond, 323.

[4] Reg. *v.* Brunskill, 8 U. C. Q. B. 546 ; United States *v.* Imsand, 1 Woods, 581 ; United States *v.* Pipes of Distilled Spirits, 5 Saw. 421 ; United States *v.* Anthony, 14 Blatch. 92 ; United States *v.* One Case, &c. 6 Ben. 493 ; United States *v.* One hundred Barrels of Spirits, 2 Abb. U. S. 305, 306.

[5] Rex *v.* Benwell, 6 T. R. 75 ; Mock *v.* The State, 11 Texas Ap. 56, 57 ; The State *v.* Upchurch, 72 N. C. 146 ; The State *v.* Welch, 28 Misso. 600 ; Berry *v.* The State, 10 Texas Ap. 315 ; Lose *v.* The State, 72 Ind. 285.

[6] The State *v.* Welch, 28 Misso. 600.

[7] Berry *v.* The State, 10 Texas Ap. 315.

[8] The State *v.* Scammon, 2 Fost. N. H. 44 ; Rex *v.* Longmead, 2 Leach, 4th ed. 694.

[9] **Naval Stores,** — having unlawfully in possession, 6 Went. Pl. 405 ; Reg. *v.* Silversides, 3 Q. B. 406 ; Reg. *v.* Sunley, Bell C. C. 145, 8 Cox C. C. 179 ; Reg. *v.* Sleep, 8 Cox C. C. 472. **False Answers,** —giving, to collector of customs, 1 Cox C. C. App. 15. **Brewers,** — frauds by, 4 Went. Pl. 431, 440, 442, 443. **Custom-house Fraud,** — Reg. *v.* Christey, 1 Cox C. C. 239 ; Rex *v.* Smith, 1 Moody, 314, 5 Car. & P. 107. **Register of Vessel,** — refusing to deliver up certificate of, Rex *v.* Walsh, 1 A. & E. 481.

CHAPTER LXXXVI.

THREATENING LETTERS AND OTHER THREATS.[1]

§ 976. **Common Law and Statutes.** — The common law of this subject[2] has been so fully covered by statutes, in broader terms and more available to prosecutors, that seldom or never will there be occasion to draw an indictment upon it; and the books furnish few or no precedents therefor. Consequently no common-law forms will be here attempted.[3] If the pleader should ever proceed on such law, he will simply set down facts within it, precisely as though his indictment was on a statute.

§ 977. **Formula for Indictment.** — The statutes are so diverse that there can be for the indictment no formula which will not require to be, in each instance, carefully modified and adjusted by the pleader to the interpreted[4] statutory terms. But there may be a suggestive outline; thus, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], did, by means of a certain letter of the tenor following [here copying the letter exactly;[5]

[1] For the direct expositions of these offences, with the pleading, evidence, and practice, see Crim. Law, II. § 1200, 1201; Crim. Proced. II. § 1024–1029 *b*. Incidental, Crim. Law, I. § 562, 563, 762, 767; II. § 407; Crim. Proced. I. § 53, 959 *d*; Stat. Crimes, § 223, 228, 242, 306, 312.

[2] Crim. Law, II. § 407, 1201.

[3] Crim. Proced. II. § 1024.

[4] Ante, § 32.

[5] **Tenor or Substance.** — It is believed to be not generally necessary, in this sort of offence, to set out the words, whether oral or written, by their tenor; but particular terms of statutes may render the exact words so far of the essence of the wrong as to require their tenor in allegation. Crim. Proced. II. § 1026. Compare with ante, § 241, 243, 246, 247, 285, 327, 328, 367–370, 378, 390, 392, 395, 397, 414–416, 420, 455, 460, 567, 578, 619, 633, 634, 677, 679, 734–736, 845, 847, 852, 858, 859, 871. All the English precedents for sending threatening letters set out the letters by their tenor, and this seems to be deemed necessary. Crim. Proced. II. § 1026. Those for menaces to extort do not aver the menaces so; nor, plainly, need they. It is difficult to distinguish the two classes of cases by rule; and, instead of attempting it here, I shall quote what a learned judge once said on the subject. After explaining that, in the indictment for sending a challenge to fight a duel, the challenge though in writing need not be alleged in words (ante, § 378), he proceeds: "If no letter had been written, the fact might have been proved by other means; since neither the common law nor the statute requires a challenge to be in writing, in order to constitute a crime for sending one. . . . The law requires no more than that a complete offence should be shown in every indictment, so as to enable the court to give judgment upon it, in

or, by certain oral words importing that, &c.], threaten one [*or* the said] X [ante, § 79] that, &c. [adding the nature of the threat], whereby, &c. [state what was accomplished by the threat, if by the statute an essential part of the crime; *or*, with intent, &c.; *or*, &c. covering the terms of the interpreted statute, whatever they may be]; against the peace, &c. [ante, § 65–69].[1]

§ 978. **Threatening Letter.** — A form on the English statute, for sending a threatening letter, is given in "Criminal Procedure."[2]

§ 979. **Threat to Accuse of Crime.** — To extort money or other valuables from one by a threat to bring against him an accusation of crime is indictable at the common law.[3] So also it is under various statutes English and American. One form of the statute is: "Whoever, either verbally or by a written or printed

case a demurrer were joined, or a writ of error brought. Upon this principle it is, that indictments for sending threatening letters must set out the letters themselves, in order that the court may see whether they are of that kind which the statute renders criminal; the same rule extends to forgery, the instrument charged to be forged must be set out *verbatim* in order that the court may see that it is such an instrument as the prohibition of the law extends to. But if the defendant had been simply charged with sending a challenge to fight a duel, without any recital of the letter, . . . the court must have seen, upon the face of the indictment, that a crime had been committed, and the specific degree of it pointed out, so as to enable them to supply the punishment annexed to the act of 1802." Taylor, C. J. in The State *v.* Farrier, 1 Hawks, 487, 490.

[1] For forms and precedents, see Crim. Proced. II. § 1025; Archb. Crim. Pl. & Ev. 19th ed. 459, 460, 463, 464, 912; 3 Chit. Crim. Law, 844–848; 1 Cox C. C. App. 11; 4 Ib. App. 22; 6 Ib. App. 19; Rex *v.* Southerton, 6 East, 126; Rex *v.* Robinson, 2 Leach, 4th ed. 749; Rex *v.* Major, 2 Leach, 4th ed. 772; Rex *v.* Wagstaff, Russ. & Ry. 398; Rex *v.* Paddle, Russ. & Ry. 484; Rex *v.* Hickman, 1 Moody, 34; Reg. *v.* Grimwade, 1 Den. C. C. 30, 1 Car. & K. 592, 1 Cox C. C. 85; Reg. *v.* Middleditch, 1 Den. C. C. 92, 2 Cox C. C. 313; Reg. *v.* Jones, 1 Den. C. C. 218, 2 Car. & K. 398, 2 Cox C. C. 434; Reg. *v.* Walton, Leigh & C. 288, 9 Cox C. C. 268; Reg. *v.* Robertson, Leigh & C. 483, 10 Cox C. C. 9; Reg. *v.* Burridge, 2 Moody & R. 296; Rex *v.* Abgood, 2 Car. & P. 436; Reg. *v.* Carruthers, 1 Cox C. C. 138; Reg. *v.* Braynell, 4 Cox C. C. 402; Reg. *v.* Tiddeman, 4 Cox C. C. 387; Reg. *v.* John, 13 Cox C. C. 100, 107; Rex *v.* McBennet, Jebb, 148; Reg. *v.* Flannery, Jebb, 243.

Indiana. — Kessler *v.* The State, 50 Ind. 229; Kistler *v.* The State, 54 Ind. 400; McMillen *v.* The State, 60 Ind. 216; Peachee *v.* The State, 63 Ind. 399; The State *v.* Hammond, 80 Ind. 80.

Iowa. — The State *v.* Young, 26 Iowa, 122.

Massachusetts. — Commonwealth *v.* Murphy, 12 Allen, 449; Robinson *v.* Commonwealth, 101 Mass. 27; Commonwealth *v.* Moulton, 108 Mass. 307; Commonwealth *v.* Dorus, 108 Mass. 488; Commonwealth *v.* Goodwin, 122 Mass. 19; Commonwealth *v.* Philpot, 130 Mass. 59; Commonwealth *v.* Bacon, 135 Mass. 521.

Minnesota. — The State *v.* Ullman, 5 Minn. 13.

Ohio. — Elliott *v.* The State, 36 Ohio State, 318, 319.

Pennsylvania. — Respublica *v.* De Longchamps, 1 Dall. 111.

Vermont. — The State *v.* Benedict, 11 Vt. 236.

Virginia. — Mitchell *v.* Commonwealth, 1 Mat. 856.

[2] Crim. Proced. II. § 1025.

[3] Crim. Law, I. § 762; II. § 407, 1201.

communication, maliciously threatens to accuse another of any crime or offence, . . . with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, shall," &c.[1] The words "either verbally or by a written or printed communication," not in the English and some other statutes, must be covered by the allegations.[2] But all the allegations may be brief; thus, —

That A, &c. on, &c. at, &c. maliciously and verbally did threaten one X to accuse him of having committed the crime of adultery [in a State where adultery is indictable] with Y, wife of Z [*or*, &c. setting forth, in the like brief way,[3] any other crime], with the intent thereby to extort money [*or*, &c. according to the fact] from the said X; against the peace, &c.[4]

§ 980. **Demanding, &c. by Threats.** — There are statutes, in various terms, to punish one's obtaining, or attempting to obtain, something of another by other menaces and threats; but the expositions and forms already given in this chapter will furnish to the pleader all needed help.[5]

[1] Mass. Gen. Stats. c. 160, § 28. The English 24 & 25 Vict. c. 96, § 47, is in terms similar, but distinctly differing.

[2] Crim. Proced. I. § 1027. As to which, see further, Elliott *v.* The State, 36 Ohio State, 318, 324; The State *v.* Young, 26 Iowa, 122.

[3] Rex *v.* Tucker, 1 Moody, 134; ante, § 100, 106.

[4] Substantially after the precedent in Commonwealth *v.* Moulton, 108 Mass. 307. For other precedents, see Commonwealth *v.* Carpenter, 108 Mass. 15; Commonwealth *v.* Dorus, 108 Mass. 488; Commonwealth *v.* Murphy, 12 Allen, 449; Robinson *v.* Commonwealth, 101 Mass. 27; Commonwealth *v.* Goodwin, 122 Mass. 19; Commonwealth *v.* Philpot, 130 Mass. 59; Commonwealth *v.* Bacon, 135 Mass. 521. On the Iowa statute, The State *v.* Young, 26 Iowa, 122. On the Ohio statute, Elliott *v.* The State, 36 Ohio State, 318, 319 On the English statute, Reg. *v.* Middleditch, 1 Den. C. C. 92, 9 Cox C. C. 313; Reg. *v.* Tiddeman, 4 Cox C. C. 387; Reg. *v.* Braynell, 4 Cox C. C. 402. Archbold's (Crim. Pl. & Ev. 19th ed. 463) form is, —

That A, &c. on, &c. at, &c. feloniously did threaten one X to accuse him the said X of having attempted and endeavored to commit the abominable crime of sodomy with the said A, with a view and intent thereby then and there to extort and gain money from the said A; against the peace, &c.

[5] For forms and precedents, see Reg. *v.* Walton, Leigh & C. 288, 9 Cox C. C. 268; Reg. *v.* Robertson, Leigh & C. 483, 10 Cox C. C. 9; Reg. *v.* John, 13 Cox C. C. 100, 107; Kessler *v.* The State, 50 Ind. 229; McMillen *v.* The State, 60 Ind. 216; Peachee *v.* The State, 63 Ind. 399; The State *v.* Hammond, 80 Ind. 80.

For TIPPLING-HOUSE, see ante, § 817–822.

CHAPTER LXXXVII.

TOLLS, OFFENCES AS TO.[1]

§ 981. **False Toll-dish.** — A statute provided, under a forfeiture, that millers "shall take no more toll for grinding than one eighth part of the indian corn and wheat,[2] and one fourteenth part for chopping grain of any kind." It then directed them to "keep in their mills the following measures, namely, a half bushel and peck of full measure, and also proper toll-dishes for each measure;" adding, that "every owner, by himself, servant, &c. keeping any mill, who shall keep any false toll-dishes contrary to the true intent and meaning of this chapter, shall be deemed to be guilty of a misdemeanor." And this misdemeanor was held to be committed by one who openly kept a toll-dish larger than the statute allowed, demanding more toll because deeming the statutory provision inadequate.[3]

§ 982. **Form for Indictment.** — The allegations may be, —

That A, &c. [ante, § 74–77], on, &c. [ante, § 80, adding the continuando as at ante, § 81–84, or not, as the pleader chooses], at, &c. [ante, § 80], being the owner of a certain public mill for the grinding of wheat and corn for toll, did then and there [*or* there during all the time aforesaid] in his said mill keep a false toll-dish of the contents of more than one eighth of a half bushel for a half bushel of full measure [adding, if the pleader chooses, but unnecessarily, to wit, of the contents of one seventh part of a half bushel [4]]; against the peace, &c. [ante, § 65–69].[5]

[1] Stat. Crimes, § 313, note.

[2] One disobeying this provision cannot be convicted on an indictment charging him with keeping a false toll-dish, if he takes out too much toll with a true toll-dish. The State *v.* Nixon, 5 Jones, N. C. 257.

[3] The State *v.* Perry, 5 Jones, N. C. 252.

[4] Compare with ante, § 906, 907, 909.

[5] The State *v.* Perry, 5 Jones, N. C. 252; The State *v.* Nixon, 5 Jones, N. C. 257. With the forms in these cases, the reader will see, I have taken some liberties; but none not plainly justifiable. As to the matter in brackets, said Pearson, J. in the former case, p. 256: "The objection that the indictment does not aver the contents of the false toll-dish, so that the court may know that it was more than one eighth of a half bushel, is untenable. We think it sufficient to aver that it was a false toll-

§ 983. **Illegal Tolls.** — For the demanding or taking of illegal tolls, the indictment will vary with the special facts and the law applicable thereto. A form in one of the books is, in substance, —

That A, &c. on, &c. at, &c. being the collector of tolls at a certain gate called, &c. upon a certain turnpike road there situate called, &c. did then and there unlawfully ask and take from one X the sum of, &c. as and for toll for, &c. [for example, one horse on which the said A was then and there riding], for passing through the said gate, the same being a greater toll than the statute in that behalf made and provided did then and there direct and authorize; against the peace, &c.[1]

§ 984. **Evading Toll.** — The offence of evading toll, and the form of indictment therefor, will vary with the statutory terms. The allegations must cover them, and the foregoing forms will sufficiently suggest how they should be.[2]

§ 985. **Other Forms** — may be required, but it is believed that none will present any special difficulties to the pleader.[3]

dish, contrary to the form of the statute. The court knows, from the statute, that one eighth is the proper measure; so, of course, a false toll-dish is one the contents of which is more than one eighth, and *cui bono* aver under a *videlicet* that it was one seventh, when the averment would be sustained by proof of a measure of the contents of one fifth, or any other measure more than one eighth."

[1] 3 Burn Just. "Highways," &c. 28th ed. 305. For a form more complicated, see 2 Chit. Crim. Law, 299. For an insufficient indictment for taking illegal toll, see Lewis *v.* The State, 41 Ala. 414, which case consult as to the sufficiency of the form in the text. Taking excessive toll, The State *v.* Bishop, 7 Conn. 181. Demanding illegal tolls, Reg. *v.* Campion, 28 U. C. Q. B. 259. A statute making it an offence to "take a greater toll than is authorized by law" does not apply to the taking from a person exempt. Ib. Further as to persons exempt, Camden Turnpike *v.* Fowler, 4 Zab. 205; Baltimore, &c. Turnpike *v.* Garrett, 50 Md. 68. Rights of the toll-taker, Plank Road *v.* Faulkner, 21 Barb. 212; The State *v.* Dearborn, 15 Maine, 402. **Bicycle.** — As to whether a bicycle is subject to toll, Williams *v.* Ellis, 5 Q. B. D. 175.

[2] For expositions under various statutes, see Reg. *v.* Caister, 30 U. C. Q. B. 247; Hunter *v.* Burnsville Turnpike, 56 Ind. 213; Hollingworth *v.* The State, 29 Ohio State, 552; The State *v.* Dearborn, 15 Maine, 402; Camden Turnpike *v.* Fowler, 4 Zab. 205; Plank Road *v.* Faulkner, 21 Barb. 212; Reg. *v.* Irving, 12 Q. B. 429. For forms of conviction for evading toll, see Reg. *v.* Irving, supra; Reg. *v.* Haystead, 7 U. C. Q. B. 9; Reg. *v.* Dawes, 22 U. C. Q. B. 333; Reg. *v.* Caister, 30 U. C. Q. B. 247.

[3] For passing one's vessel through a drawbridge before another having the preference, in disobedience to the orders of the superintendent, Commonwealth *v.* Chase, 127 Mass. 7, 8. Injuring a toll-gate, Jay *v.* The State, 69 Ind. 158.

For TRADES, OFFENSIVE, see ante, § 827–831.

CHAPTER LXXXVIII.

TREASON.[1]

§ 986. **The Precedents.** — The English precedents for the indictment, many of which are for sorts of treason unknown to our law, are multitudinous. Our American books furnish us with a few. All are loaded with surplusage; nor do the decisions disclose precisely what, in every particular, may be spared from them.

§ 987. **English Form for Levying War.** — Instead of the usual formula, let us place here an approved English form for levying war; namely, —

That A, &c. [ante, § 74–77], being a subject of our said Lady the Queen, not regarding the duty of his allegiance[2] [nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil[3]], as a false traitor against our said Lady the Queen, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said Lady the Queen should and of right ought to bear towards our said Lady the Queen,[4] on, &c. [with force and arms[5]], at, &c. together with divers other false traitors to the jurors unknown, armed and arrayed in a warlike manner, that is to say, with guns, muskets,

[1] For the direct elucidations of this offence, with the pleading, evidence, and practice, see Crim. Law, II. § 1202–1255; Crim. Proced. II. § 1030–1041. Incidental, Crim. Law, I. § 177, 226, 267, 347, 348, 358, 361, 369, 422, 437, 440, 456, 603, 605, 611–613, 638, 655, 659, 681–684, 701–704, 711, 717, 718, 720, 722, 759, 772, 895, 967, 970–972, 990; Crim. Proced. I. § 15–19, 164, 165, 168, 171, 181, 207 *a*, 213, 220, 221, 255, 256, 437, 534, 647; II. § 2; Stat. Crimes, § 136, 139, 225, 227.

[2] Probably the expression "not regarding the duty of his allegiance" is unnecessary; yet practically, as it seems appropriate, and is short, I should retain it. Besides, either here or further on, or else in the conclusion, it must be expressed that the defendant acted contrary to his allegiance. Crim. Proced. I. § 647; II. § 1034.

[3] Plainly unnecessary and better omitted. Ante, § 44; Crim. Proced. I. § 501.

[4] This matter, "as a false," &c. is much within the same principle as that mentioned in the note before the last. And see ante, § 45, 46. Its abridgment, if not entire omission, would seem to be judicious.

[5] Unnecessary. Ante, § 43. One would hardly object to retaining these words in the present instance, except that there will always be others more appropriately expressing the idea.

blunderbusses, pistols, swords, bayonets, pikes, and other weapons,[1] being then and there unlawfully, maliciously, and traitorously assembled and gathered together against our said Lady the Queen, most wickedly, maliciously, and traitorously[2] did levy and make war against our said Lady the Queen within this realm, and did then and there maliciously and traitorously attempt and endeavor by force and arms to subvert and destroy the constitution and government of this realm as by law established, and deprive and depose our said Lady the Queen of and from the style, honor, and kingly name of the imperial crown of this realm;[3] [in contempt of our said Lady the Queen and her laws, to the evil example of all others in the like case offending[4]], contrary to the duty of the allegiance of him the said A,[5] against the peace, &c. [ante, § 65–69].[6]

[1] Practically the pleader will choose so to modify this expression as to embody the facts of the particular case.

[2] "Traitorously," in this and other like connections, is the appropriate word, and is essential. Crim. Proced. I. § 534; II. § 1035.

[3] This again should be altered to conform to our laws and the special facts.

[4] Unnecessary. Ante, § 48; Crim. Proced. I. § 647.

[5] This is the common and appropriate place for this essential allegation. See a preceding note.

[6] Archb. Crim. Pl. & Ev. 10th ed. 492, 493, 19th ed. 785. For other forms and precedents, including all the various sorts of high treason, see 2 Chit. Crim. Law, 67–84; 6 Cox C. C. App. 102; Rex *v.* Stone, 6 Went. Pl. 357, 368; Rex *v.* T. H. Trem. P. C. 1; Rex *v.* Ayliffe, Trem. P. C. 2; Rex *v.* Speke, Trem. P. C. 3; Rex *v.* Horsley, Trem. P. C. 4; Rex *v.* Gerrard, Trem. P. C. 278; Rex *v.* Hambden, Trem. P. C. 307, 308; Rex *v.* Lancaster, 1 Howell St. Tr. 39; Reg. *v.* Norfolk, 1 Howell St. Tr. 957, 959, 1035; Reg. *v.* Parry, 1 Howell St. Tr. 1095; Reg. *v.* Perrot, 1 Howell St. Tr. 1315; Reg. *v.* Lee, 1 Howell St. Tr. 1403; Reg. *v.* Blunt, 1 Howell St. Tr. 1409, 1416; Rex *v.* Raleigh, 2 Howell St. Tr. 1; Rex *v.* Conspirators, 2 Howell St. Tr. 159; Rex *v.* Ogilvie, 2 Howell St. Tr. 887 (Scotch); Rex *v.* Love, 5 Howell St. Tr. 43; Rex *v.* Sindercome, 5 Howell St. Tr. 841, 844; Rex *v.* Hewet, 5 Howell St. Tr. 883; Rex *v.* Cellier, 7 Howell St. Tr. 1043; Rex *v.* Fitzharris, 8 Howell St. Tr. 243, 336; Rex *v.* Plunket, 8 Howell St. Tr. 447, 451; Rex *v.* Stapleton, 8 Howell St. Tr. 502; Rex *v.* Colledge, 8 Howell St. Tr. 550, 554, 567; Rex *v.* Shaftesbury, 8 Howell St. Tr. 759, 775; Rex *v.* Walcot, 9 Howell St. Tr. 519; Rex *v.* Hone, 9 Howell St. Tr. 571; Rex *v.* Russell, 9 Howell St. Tr. 578; Rex *v.* Rouse, 9 Howell St. Tr. 637; Rex *v.* Sidney, 9 Howell St. Tr. 818; Rex *v.* Rosewell, 10 Howell St. Tr. 147; Rex *v.* Fernley, 11 Howell St. Tr. 382; Rex *v.* Delamere, 11 Howell St. Tr. 509, 516; Rex *v.* Grahme, 12 Howell St. Tr. 646; Rex *v.* Freind, 13 Howell St. Tr. 1, 3; Rex *v.* Parkyns, 13 Howell St. Tr. 63, 66; Rex *v.* Rookwood, 13 Howell St. Tr. 139; Rex *v.* Lowick, 13 Howell St. Tr. 267, 275; Rex *v.* Cook, 13 Howell St. Tr. 311, 345; Rex *v.* Knightley, 13 Howell St. Tr. 398; Rex *v.* Lindsay, 14 Howell St. Tr. 987; Reg. *v.* Dammaree, 15 Howell St. Tr. 522; Reg. *v.* Purchase, 15 Howell St. Tr. 651, 694; Rex *v.* Francia, 15 Howell St. Tr. 897, 902; Rex *v.* Matthews, 15 Howell St. Tr. 1323; Rex *v.* Layer, 16 Howell St. Tr. 93; Rex *v.* Townley, 18 Howell St. Tr. 330, 333; Rex *v.* Kilmarnock, 18 Howell St. Tr. 441, 454, 455, 457; Rex *v.* Hensey, 19 Howell St. Tr. 1341, 1349; Rex *v.* Gordon, 21 Howell St. Tr. 485, 494; Rex *v.* De la Motte, 21 Howell St. Tr. 687, 4 Went. Pl. 1; Rex *v.* Tyrie, 21 Howell St. Tr. 815; Rex *v.* Hardy, 24 Howell St. Tr. 199, 223, 2 Chit. Crim. Law, 79, 4 Went. Pl. 14; Rex *v.* Bird, 25 Howell St. Tr. 750; Rex *v.* Jackson, 25 Howell St. Tr. 783, 785; Rex *v.* Stone, 25 Howell St. Tr. 1155; Rex *v.* Crossfield, 26 Howell St. Tr. 1; Rex *v.* Weldon, 26 Howell St. Tr. 226; Rex *v.* Leary, 26 Howell St. Tr. 295; Rex *v.* Kennedy, 26 Howell St. Tr. 354; Rex *v.* Maclane, 26 Howell St. Tr. 722, 733;

§ 988. **Levying War against United States.** — The statutory words are: "Every person owing allegiance to the United States who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason."[1] And the Constitution adds, that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[2] Hence, and for other reasons, the indictment must set out overt acts.[3] It is believed that a method of allegation, simple, convenient, and certainly adequate, such as the following, may be resorted to, better than a too servile following of the English precedents; thus, —

That A, &c. on, &c. at, &c. being a person owing allegiance to the United States of America, did then and there, in violation of his said duty of allegiance, maliciously and traitorously counsel and abet, and combine, confederate, and agree together with, B, C [and as many other known persons as the pleader finds it convenient to insert, *or*, if he pleases, make all defendants together], and divers other persons to the number of one thousand and more whose names are to the jurors unknown, all of whom, both said known and said unknown persons, were then and there owing allegiance to the said United States, maliciously, traitorously, and in violation of their said duty of allegiance, to levy war against the said United States, with the intent to subvert the power thereof. In pursuance of which said malicious and traitorous combination and confederation, the said A and the said other known and unknown persons did, in violation of the said duty of allegiance, then and there [here set out the overt acts of treason accord-

Rex *v.* Finney, 26 Howell St. Tr. 1019; Rex *v.* O'Coigly, 26 Howell St. Tr. 1191, 1202, 1204; Rex *v.* Sheares, 27 Howell St. Tr. 255; Rex *v.* McCann, 27 Howell St. Tr. 399; Rex *v.* Byrne, 27 Howell St. Tr. 455; Rex *v.* Bond, 27 Howell St. Tr. 523, 527; Rex *v.* Hadfield, 27 Howell St. Tr. 1281, 1283; Rex *v.* Despard, 28 Howell St. Tr. 346, 359; Rex *v.* Kearney, 28 Howell St. Tr. 683, 692; Rex *v.* Roche, 28 Howell St. Tr. 754; Rex *v.* Kirwan, 28 Howell St. Tr. 775; Rex *v.* Byrne, 28 Howell St. Tr. 806; Rex *v.* Begg, 28 Howell St. Tr. 849; Rex *v.* Clare, 28 Howell St. Tr. 887; Rex *v.* Rourke, 28 Howell St. Tr. 926; Rex *v.* Doran, 28 Howell St. Tr. 1041; Rex *v.* Donnelly, 28 Howell St. Tr. 1070; Rex *v.* Emmet, 28 Howell St. Tr. 1098; Rex *v.* Howley, 28 Howell St. Tr. 1103; Rex *v.* McIntosh, 28 Howell St. Tr. 1215; Rex *v.* Keenan, 28 Howell St. Tr. 1239; Rex *v.* Redmond, 28 Howell St. Tr. 1271; Rex *v.* Watson, 32 Howell St. Tr. 2, 10; Rex *v.* Brandreth, 32 Howell St. Tr. 755; Rex *v.* Thistlewood, 33 Howell St. Tr. 681, 696; Rex *v.* Hamilton, Fost. 1, 3; Rex *v.* Tierney, Russ. & Ry. 74; Mulcahy *v.* Reg. Law Rep. 3 H. L. 306; Reg. *v.* Oxford, 9 Car. & P. 525; O'Brien *v.* Reg. 3 Cox C. C. 360; Reg. *v.* Davitt, 11 Cox C. C. 676; Reg. *v.* Deasy, 15 Cox C. C. 334; Reg. *v.* McMahon, 26 U. C. Q. B. 195.

Pennsylvania. — Respublica *v.* Carlisle, 1 Dall. 35.

United States. — United States *v.* Fries, Whart. St. Tr. 610; Davis's Case, Chase Decis. 1, 18, 57.

[1] R. S. of U. S. § 5331.

[2] Crim. Law, II. § 1214.

[3] Crim. Proced. II. § 1032.

ing to the facts, and charge them to have been done "traitorously;" as] maliciously and traitorously collect large armies, constituting together five hundred thousand men and more, and immense navies and armed and equipped vessels of war, and munitions of war for the use of said armies and navies, and the said A did then and there maliciously, traitorously, and contrary to his said duty of allegiance command and cause, &c. [proceeding, according to the facts of the particular case, to set out as many overt acts as the pleader deems expedient]; against the peace, &c.[1]

§ 989. **Adhering to Enemies of United States.** — For this branch of treason, it will be sufficient here to adapt to our use an approved English precedent; thus, —

That on, &c. and thence continually until the day of the finding of this indictment, an open and public war was and is prosecuted and carried on between the United States of America and the king [*or* republic] of X; and that A, &c. a person owing allegiance to the said United States, at, &c. during all the time aforesaid, well knowing the premises, was, in violation of his said duty of allegiance, and with the intent to aid and assist the said king, &c. in the said war, maliciously and traitorously adhering to the said king, &c. in the said war against the said United States, and giving to him and his counsellors, armies, and navies, enemies of the said United States as aforesaid, aid and comfort therein. In the prosecution, performance, and execution of which treason and traitorous adhering aforesaid, he the said A, as such false traitor as aforesaid, during the said war, to wit, on, &c. at, &c. [setting out the overt acts,[2] introducing each subsequent one thus: and in further prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said A, as such false traitor as aforesaid, afterward, and during the said war, to wit, on, &c. at, &c.]; contrary to the duty of allegiance of him the said A, against the peace, &c.[3]

[1] I have not added, in the conclusion, "contrary to the duty of allegiance of him the said A," because this matter abundantly appears in the body of the indictment. Still, some pleaders will choose to insert it here, when probably it may be omitted from the other places. There are, in this form, various words introduced by way of abundant caution, not deemed strictly necessary.

[2] It will be prudent, not saying whether absolutely necessary or not, to allege each to have been committed "traitorously," as in the last form.

[3] Archb. Crim. Pl. & Ev. 10th ed. 494, 19th ed. 787. Compare with ante, § 987 and notes. It will be seen that, in copying and adapting this form, I have greatly reduced the surplusage.

CHAPTER LXXXIX.

TRESPASS TO LANDS.

§ 990. **Elsewhere — Here — (What Indictable).** — This is one of several titles which appear in the present volume, yet not in the other volumes of the series. A mere trespass upon lands, with no other element of wrong, is not indictable under the common law [1] or probably under any statute.[2] But when augmented by certain elements it is a common-law offence, and there are statutes making it punishable when combined with what would not suffice by the unwritten rules. Alike in the other volumes and in this, the various combinations wherein trespass to lands is one of the elements are pretty fully considered under such titles as "Animals," [3] "Arson and other Burnings," [4] "Burglary and other Breakings," [5] "Fish and Game," [6] "Forcible Entry and Detainer," [7] "Larceny," [8] "Malicious Mischief," [9] "Noxious and Adulterated Food," [10] "Peace, Breaches of the," [11] "Sepulture," [12] and some others. The present chapter is introduced to direct attention to this general view of the subject, and add something as to the statutory trespass.

§ 991. **How the Indictment.** — The indictment should set out the trespass with the facts special to the individual instance, and add an allegation or allegations of whatever else the statute requires to be joined thereto to constitute the offence, all in words which will duly cover the statutory interpreted [13] terms. Thus,—

§ 992. **Formula.** — In outline, leaving the pleader to make the

[1] Crim. Law, ¹ § 538; Temple *v.* The State, 7 Baxter, 109.
[2] Arbuckle *v.* The State, 32 Ind. 34.
[3] Ante, § 167, 169, 171–175.
[4] Ante, § 178–199.
[5] Ante, § 251–261.
[6] Ante, § 439.
[7] Ante, § 441–448. And see "Forcible Trespass."
[8] Ante, § 588, 596–600.
[9] Ante, § 722–730.
[10] Ante, § 766.
[11] Ante, § 856, 857.
[12] Ante, § 957.
[13] Ante, § 32.

modifications and fillings up which the particular case demands, the charge may be, —

That A, &c. [ante, § 74–77], on, &c. at, &c. [ante, § 80], unlawfully and maliciously entered upon certain lands of one X, and thereon then and there did, &c. [say what, particularizing the act,[1] and adhering to the statutory terms], having been first forbidden by the said X to do the same [*or*, &c. setting out in like manner whatever other fact or facts the statute has specified as completing the offence]; against the peace, &c. [ante, § 65–69].[2]

§ 993. **School Lands.** — Where a statute made it punishable to "commit waste, trespass, or other injury upon any school lands in the State, or upon any improvements thereon," an indictment was sustained in substance alleging, —

That A, &c. on, &c. at, &c. did unlawfully commit waste, trespass, and other injury upon certain school lands[3] [situate, &c. and known and described, &c.[4]], by then and there unlawfully cutting down and carrying away divers, to wit, fifty timber trees and fifty other trees thereon standing and growing; against the peace, &c.[5]

§ 994. **Entering after Forbidden.** — Where a statute makes punishable one who, "after being forbidden to do so, shall enter on the premises of another without a license therefor," it seems

[1] See post, § 994.

[2] For precedents under differing statutes, see —

Alabama. — McGehee *v.* The State, 58 Ala. 360; Carroll *v.* The State, 58 Ala. 396; Johnson *v.* The State, 61 Ala. 9; Watson *v.* The State, 63 Ala. 19. As to the offence, see also Sandy *v.* The State, 60 Ala. 18; Daniels *v.* The State, 60 Ala. 56.

Indiana. — Newland *v.* The State, 30 Ind. 111; Stribbling *v.* The State, 56 Ind. 79; Squires *v.* The State, 59 Ind. 261; Derixson *v.* The State, 65 Ind. 385; Johnson *v.* The State, 68 Ind. 43; The State *v.* Enochs, 69 Ind. 314; Dorrell *v.* The State, 80 Ind. 566. And see further, as to the law and the indictment, Dawson *v.* The State, 52 Ind. 478; The State *v.* Sparks, 60 Ind. 298; The State *v.* Pitzer, 62 Ind. 362; Lossen *v.* The State, 62 Ind. 437; The State *v.* Scott, 68 Ind. 267; The State *v.* Allisbach, 69 Ind. 50.

Kansas. — The State *v.* Jennerson, 14 Kan. 133. And see further as to the offence and the procedure, The State *v.* Gurnee, 14 Kan. 111; The State *v.* Grewell, 19 Kan. 189.

Missouri. — The State *v.* Myers, 20 Misso. 409; The State *v.* Guernsey, 9 Misso. Ap. 312.

North Carolina. — The State *v.* Whitehurst, 70 N. C. 85; The State *v.* Sherrill, 81 N. C. 550; The State *v.* Laney, 87 N. C. 535, 536; The State *v.* Walker, 87 N. C. 541. And see further as to the law and procedure for this offence, The State *v.* Williams, Busbee, 197; The State *v.* Hanks, 66 N. C. 612; The State *v.* Presly, 72 N. C. 204.

Tennessee. — Walpole *v.* The State, 9 Baxter, 370.

Texas. — See Cleveland *v.* The State, 8 Texas Ap. 44.

[3] Not necessary to allege the ownership. Ante, § 183 and note.

[4] The analogies indicate that none of the matter in these brackets is necessary. Ante, § 179 and note, 253 and note, 437–439, 442 and note, 445, 596–599, 723–729.

[5] The State *v.* Myers, 20 Misso. 409.

to be accepted as adequate, while yet it does not quite satisfy the stricter rules, to aver, —

That A, &c. on, &c. at, &c. unlawfully did enter upon [and pass through and over a certain enclosed field [1] of] the premises of one X, without any license therefor, after having been by the said X forbidden so to do; against the peace, &c.[2]

§ 995. **Removing Fence.** — Under the words "without license from competent authority, shall cut down or remove from the lands of another any tree, stone, timber, or other valuable article," it is good to allege, —

That A, &c. on, &c. at, &c. did unlawfully remove from the lands of X, without license from said X or any other competent authority, certain rails and stakes of the said X of the value of five dollars, constituting a fence thereon; against the peace, &c.[3]

[1] This matter in brackets is not in the form before me, which was adjudged good. I should deem the indictment better with it.

[2] The State *v.* Whitehurst, 70 N. C. 85, omitting some obvious surplusage.

[3] Dorrell *v.* The State, 80 Ind. 566.

For TURNPIKE, see TOLLS — WAY.
UNLAWFUL ASSEMBLY, see RIOT, &c.

CHAPTER XC.

UNLICENSED BUSINESS.[1]

§ 996. **Elsewhere.** — The note to this title explains that the greater part of what is comprehended within it is, in this series of volumes, treated of under other titles severally of narrower meaning. In the present volume, the corresponding other titles are "Hawkers and Peddlers," [2] "Liquor Keeping and Selling," [3] "Lotteries," [4] and the sub-title "Liquor and Tippling Shops." [5]

§ 997. **Formula for Indictment.** — The statutes and their subjects being various, there can be no complete formula for the indictment. As an outline, that given under the title "Liquor Keeping and Selling" [6] may be consulted. Or, if the pleader chooses, he may aver, —

That A, &c. [adding time, place, &c. as at ante, § 642], unlawfully did carry on the business of, &c. [say what; *or*, unlawfully did exhibit, &c.; *or*, &c. covering otherwise the statute according to the special fact], without having first obtained any license or authority therefor; against the peace, &c. [ante, § 65–69].[7]

[1] For direct expositions of various sorts of unlicensed business, with the pleading, evidence, and practice, see Stat. Crimes, Lotteries, § 950–966; Liquor Selling, § 983–1053; Keeping, &c. for Unlawful Sale, § 1054–1058; Liquor Nuisances, § 1059–1070 *b*; Hawkers and Peddlers, § 1071–1088; Further of Unlicensed Business, § 1089–1098. Incidental, see various places in those titles referred to, and Crim. Proced. I. § 469; II. § 282; Stat. Crimes, § 20, 22, 151, 156, 854 *a*. And see places referred to in the next four notes.

[2] Ante, § 508–510.

[3] Ante, § 640–660.

[4] Ante, § 672–679.

[5] Ante, § 818, 820.

[6] Ante, § 642. And see § 655, 656.

[7] For precedents, see, besides the places referred to under the several minor titles, 3 Chit. Crim. Law, 672; 4 Went. Pl. 430, 431; 4 Cox C. C. App. 1; Rex *v.* Harsant, Trem. P. C. 242; Rex *v.* Plym, Trem. P. C. 264; Reg. *v.* Buchanan, 8 Q. B. 883; Reg. *v.* Tucker, 2 Q. B. D. 417, 13 Cox C. C. 600; Reg. *v.* Otway, 4 Cox C. C. 59; Reg. *v.* Buchanan, 2 Cox C. C. 36; Reg. *v.* Lennox, 26 U. C. Q. B. 141.

Alabama. — Cousins *v.* The State, 50 Ala. 113; Perkins *v.* The State, 50 Ala. 154; Henback *v.* The State, 53 Ala. 523; Barnett *v.* The State, 54 Ala. 579; Gillman *v.* The State, 55 Ala. 248; Merritt *v.* The State, 59 Ala. 46.

Arkansas. — The State *v.* Adams, 16

§ 998. **Unlicensed dealing as Merchant.**[1] — Subject to be varied with the terms of the interpreted[2] statute, the allegations may be, —

That A, &c. on, &c. [adding the continuando as at ante, § 81–84, or not, as the pleader chooses], at, &c. at a certain store and place there,[3] did unlawfully carry on the business of merchandising and dealing[4] as a merchant [*or*, &c. adhering to the statutory terms], and did then and there and therein sell as a merchant dry goods and groceries [*or*, &c. according to the fact] to all persons desiring to purchase the same [*or*, certain articles, enumerating them, to one X, and certain enumerated articles to one Y, &c.[5]], not having any license or authority therefor; against the peace, &c.[6]

§ 999. **Unlicensed Physician and Surgeon.**[7] — An old English precedent, suggestive to the pleader, while yet he will discard its surplusage, and cover the statute of his own State, is, —

That A, &c. [being an illiterate man and unskilled in the art or faculty of medicine and surgery,[8] and devising and intending by divers unlawful

Ark. 497; The State *v.* Clayton, 32 Ark. 185.

Connecticut. — The State *v.* Kilbourn, 9 Conn. 560.

Georgia. — Stringfield *v.* The State, 25 Ga. 474.

Illinois. — Munn *v.* People, 69 Ill. 80.

Indiana. — Alcott *v.* The State, 8 Blackf. 6; Henderson *v.* The State, 50 Ind. 234.

Kansas. — Territory *v.* Reyburn, McCahon, 134.

Massachusetts. — Commonwealth *v.* Rice, 9 Met. 253; Commonwealth *v.* Stodder, 2 Cush. 562, 565; Commonwealth *v.* Twitchell, 4 Cush. 74; Commonwealth *v.* Gee, 6 Cush. 174.

Missouri. — The State *v.* Hardwick, 2 Misso. 226; Wheat *v.* The State, 6 Misso. 455; Simmons *v.* The State, 12 Misso. 268; The State *v.* Goode, 24 Misso. 361; The State *v.* Miller, 24 Misso. 532; The State *v.* North, 27 Misso. 464; The State *v.* Cox, 32 Misso. 566.

Nevada. — The State *v.* Ah Chew, 16 Nev. 50, 53.

New Hampshire. — The State *v.* Fletcher, 5 N. H. 257.

New York. — People *v.* Koll, 3 Keyes, 236.

North Carolina. — The State *v.* Chadbourn, 80 N. C. 479.

Pennsylvania. — Commonwealth *v.* Fiegle, 2 Philad. 215; Commonwealth *v.* Fox, 10 Philad. 204.

South Carolina. — The State *v.* Hayne, 4 S. C. 403.

Texas. — The State *v.* Goldman, 44 Texas, 104; Logan *v.* The State, 5 Texas Ap. 306, 308; Smith *v.* The State, 5 Texas Ap. 318; Antle *v.* The State, 6 Texas Ap. 202; Ellison *v.* The State, 6 Texas Ap. 248.

Virginia. — Burner *v.* Commonwealth, 13 Grat. 778.

West Virginia. — The State *v.* Whitter, 18 W. Va. 306, 307.

United States. — United States *v.* Williams, 5 Cranch C. C. 62, 66.

[1] Stat. Crimes, § 1011, 1090–1092. Compare with ante, § 508–510.

[2] Ante, § 32.

[3] Compare with ante, § 647, 656.

[4] Compare with ante, § 655.

[5] Stat. Crimes, § 1091.

[6] I have not servilely copied any of the precedents. See, for precedents, The State *v.* Cox, 32 Misso. 566; The State *v.* Willis, 37 Misso. 192; The State *v.* Jacobs, 38 Misso. 379; The State *v.* Hardwick, 2 Misso. 226; The State *v.* North, 27 Misso. 464; The State *v.* Miller, 24 Misso. 532; Perkins *v.* The State, 50 Ala. 154; Merritt *v.* The State, 59 Ala. 46; Alcott *v.* The State, 8 Blackf. 6; The State *v.* Whitter, 18 W. Va. 306, 307; The State *v.* Chadbourn, 80 N. C. 479.

[7] Stat. Crimes, § 1095.

[8] Evidently not necessary; for the de-

means falsely, unlawfully, craftily, and wickedly to deceive and defraud the liege and faithful subjects of the Lord the King of their goods, chattels, and moneys, to maintain his dishonest course of living [1], on, &c. and thence continually until the day of the finding of this indictment [ante, § 81–84], [to wit, for the space of ten whole months and more [2]]; [with force and arms [3]], at, &c. [and in divers other places in said county [4]], falsely, unlawfully, [impudently,[5] and for the sake of wicked gain [6]] did assume upon himself to execute, exercise, and occupy the art, faculty, and science of a physician and surgeon, and then and there falsely and impudently did publish that he was a physician and surgeon, and as a physician and surgeon did give, administer, and apply [improper, noxious, insalubrious, and most dangerous medicines as good and salubrious [7]] medicines to divers subjects of the said Lord the King, afflicted with various infirmities, diseases, and wounds [in the county, &c. to wit, in the parish, &c. in the county, &c. and in divers other places in said county [8]], he the said A never being admitted, approved, or allowed by the Bishop of Norwich, in whose diocese the said A for the whole time aforesaid did dwell, and for the same time did act and practise as a physician and surgeon, or, in the absence of the said bishop from his diocese, by the vicar-general of the said bishop, to exercise the said faculty; [9] [to the great damage, injury, and manifest deceit of very many liege subjects of the said Lord the King, to the evil and pernicious example, &c.[10] and] against the peace, &c.[11]

§ 1000. **Public Show — (Theatricals, &c.).** — Where a statute authorizes the selectmen of the several towns to "license all theatrical exhibitions, public shows, and exhibitions of any description, to which admission is obtained on payment of money,

fendant's offence is not that he is illiterate, but that he has disobeyed a statute by conducting a medical and surgical practice without the required license. And see ante, § 848 and note.

[1] This sort of malediction is evidently of no practical use, and it better be omitted. If the statute makes a particular evil intent an element in the offence, it must be alleged and proved; but to charge what is not essential to its constitution can only perplex the jury and obstruct justice.

[2] If the statute makes the practice during a given length of time essential to the offence, matter like this in these brackets, covering the statutory terms, should be inserted. Otherwise nothing of this is required.

[3] Unnecessary. Ante, § 43.

[4] No reason is discoverable rendering the matter in these brackets important.

[5] "Impudently" is so much in the nature of a mere malediction that it can be neither necessary nor desirable.

[6] Needless. Ante, § 795, note, and places referred to.

[7] As the offence in no wise depends on the quality of the medicines prescribed, it is better to omit this sort of allegation.

[8] There is evidently nothing to be gained by this sort of repetition.

[9] This negation of the license is in many more words than are either necessary or judicious. Ante, § 642, note.

[10] Needless. Ante, § 48.

[11] Rex *v.* Harsant, Trem. P. C. 242. For other precedents, see United States *v.* Williams, 5 Cranch C. C. 62, 66; The State *v.* Goldman, 44 Texas, 104; Logan *v.* The State, 5 Texas Ap. 306, 308; Smith *v.* The State, 5 Texas Ap. 318; Antle *v.* The State, 6 Texas Ap. 202; Ellison *v.* The State, 6 Texas Ap. 248.

upon such terms and conditions as they shall think reasonable," &c. then declares punishable one "who shall set up or promote any such exhibition or show, or shall publish or advertise the same, or otherwise aid or assist therein, without a license first obtained,"[1] the indictment may charge, —

That A, &c. on, &c. at, &c. did unlawfully[2] set up and promote a certain exhibition and public show, to which admission was obtained by the payment of twelve and a half cents in money by each person admitted thereto, the same purporting to be, &c. [saying what], without having first obtained any license therefor. [And the said A did then and there admit divers persons thereto, for a certain sum of money, to wit, twelve and a half cents, by each paid to the said A, to witness the same[3]]; against the peace, &c.[4]

§ 1001. **Other Forms** — may be constructed on the model of these and those in the other chapters already referred to.[5] The statutes are so varying in terms that to cover all would require a good deal of space with small return of profit to the reader.

[1] Mass. R. S. c. 58, § 1, 2.

[2] "Unlawfully" is not in the form before me, and it was well adjudged not to be necessary. Still, in this and various other instances, I have deemed its insertion in the forms to be judicious.

[3] In substance in the form before me, yet the offence seems to be fully charged without this matter.

[4] Commonwealth *v.* Twitchell, 4 Cush. 74. For keeping a dancing-house unlicensed, 3 Chit. Crim. Law, 672. Unlicensed theatricals and other amusements, People *v.* Koll, 3 Keyes, 236; Commonwealth *v.* Fox, 10 Philad. 204; Gillman *v.* The State, 55 Ala. 248; Commonwealth *v.* Gee, 6 Cush. 174. **Dancing and Music,** — place for, Reg. *v.* Tucker, 2 Q. B. D. 417, 13 Cox C. C. 600.

[5] See precedents for **Keeping Ferry** — without license, Wheat *v.* The State, 6 Misso. 455; Territory *v.* Reyburn, McCabon, 134. **Attorney-at-Law,** — unlicensed practising as, Reg. *v.* Buchanan, 8 Q. B. 883; Reg. *v.* Buchanan, 2 Cox C. C. 36; Cousins *v.* The State, 50 Ala. 113; Simmons *v.* The State, 12 Misso. 268; The State *v.* Hayne, 4 S. C. 403. **Broker,** — unlicensed, Henderson *v.* The State, 50 Ind. 234. **Inns and Victualling Houses,** — keeping unlicensed, The State *v.* Fletcher, 5 N. H. 257; The State *v.* Adams, 16 Ark. 497; Burner *v.* Commonwealth, 13 Grat. 778; The State *v.* Kilbourn, 9 Conn. 560. **Warehouse and Elevator,** — keeping unlicensed, Munn *v.* People, 69 Ill. 80. **Fire-arms and Ammunition,** — having, without license, Reg. *v.* Otway, 4 Cox C. C. 59.

For UNNATURAL CRIME, see SODOMY.
UNWHOLESOME FOOD, see NOXIOUS AND ADULTERATED FOOD.
USURPING OFFICE, see ante, § 848, 849.

CHAPTER XCI.

USURY.[1]

§ 1002. **Indictment Statutory.** — Whatever we may deem the unwritten law of our States on this subject to be, practically no prosecuting officer will be likely to attempt an indictment upon it, nor in all the States are there statutes available for the purpose.

§ 1003. **Statute and Form.** — On the statutory words, "In any case where more than legal interest shall be taken, the person taking the same shall be liable to indictment or presentment, and, on conviction, shall be fined a sum not less than the whole usurious interest so taken and received, which amount shall be ascertained by the jury trying the case: provided, that no fine shall be less than ten dollars," the allegations may be, —

That A, &c. on, &c. at, &c. unlawfully and usuriously did take and receive of and from one X, for the interest, use, and forbearance of certain good and valid bank-notes treated between the said A and the said X and commonly circulating as money, of the amount and value of two hundred and thirty-two dollars, for the space of four months preceding said day, the sum of thirty-five dollars in other such bank-notes so treated and circulating [the said smaller sum being more than the legal interest of six per centum per annum, or at that rate for a longer or shorter period; to wit, the true and lawful interest being four dollars and sixty-four cents, and no more[2]]; against the peace, &c.[3]

[1] For the direct expositions, see Crim. Law, II. § 1260–1263. Incidental, Crim. Proced. I. § 580.

[2] In substance in the form before me; but, being a mere allegation of law, it cannot be necessary. Ante, § 734 and note and places there referred to, 820 and note.

[3] In substance as in Gillespie *v.* The State, 6 Humph. 164. For other precedents, see 2 Chit. Crim. Law, 548; Rex *v.* Farmer, Trem. P. C. 269; The State *v.* Tappan, 15 N. H. 91; Wilkerson *v.* The State, 2 Ind. 546; The State *v.* Williams, 4 Ind. 234; Malone *v.* The State, 14 Ind. 219.

For UTTERING COUNTERFEITS, see ante, § 337–341, 460, 462, 466–472, 476, 479.

CHAPTER XCII.

VAGRANCY AND OTHER LIKE OFFENCES.[1]

§ 1004. **Begging.** — Under a statute to punish "every person wandering abroad or placing himself or herself in any public place, street, highway, court, or passage to beg or gather alms,"[2] the allegations may be, —

That A, &c. on, &c. at, &c. unlawfully did wander abroad in a certain public thoroughfare there, begging and gathering alms; against the peace, &c.[3]

§ 1005. **Disorderly and Idle Persons.** — Where "idle and disorderly persons, including therein those persons who neglect all lawful business and habitually misspend their time by frequenting houses of ill-fame, gaming-houses, or tippling-shops," are made the subjects of punishment, it may be averred, —

That A, &c. [ante, § 74–77], on, &c. and thence continually until, &c. [ante, § 81–84], at, &c. [ante, § 80], was and is an idle and disorderly person, and there during all said time has neglected all lawful business, and habitually misspent his time by frequenting houses of ill-fame, gaming-houses, and tippling-shops; against the peace, &c. [ante, § 65–69].[4]

§ 1006. **Incorrigible Rogue** — is the expression in some English statutes; and, it is believed, in American ones. But the meaning of the words will be influenced by their connection; and, in the absence of adjudications, it will suffice simply to refer to an English precedent.[5]

§ 1007. **Night-walker.** — To constitute one a night-walker at the common law, he must do something beyond a mere walking

[1] As to Idleness, — see Crim. Law, I. § 453–455, 515, 516. Night-walking, — Crim. Law, I. § 501 and note; Crim. Proced. I. § 169, 182; II. § 874 *a*. Vagrancy, — Crim. Law, I. § 515, 516, 706. And see ante, § 823–826.

[2] 5 Geo. 4, c. 83, § 3.

[3] Pointon *v.* Hill, 12 Q. B. D. 306. See also, as to begging, In re Haller, 3 Abb. N. Cas. 65.

[4] Commonwealth *v.* Sullivan, 5 Allen, 511. For other precedents, see Commonwealth *v.* Hawks, 13 Allen, 550; Commonwealth *v.* Norton, 13 Allen, 550; Palmer *v.* People, 43 Mich. 414, 415.

[5] 3 Chit. Crim. Law, 681.

of the streets at night. There must be added the commission of petty offences; or, at least, conduct to make him a common nuisance.[1] Still it is believed that, by the better opinion, this added matter, which from its nature may be general, need not be alleged in minute terms,[2] and that the following form, without the words here given in brackets, will suffice, while by all opinions it will be adequate with them: —

That A, &c. on, &c. [*adding*, and thence continually until, &c. as at ante, § 81–84, or not, as the pleader chooses], at, &c. was a common night-walker, walking and perambulating in and through the streets at unseasonable hours of the night without lawful business, for unlawful and evil purposes, and to the disturbance of all good and well-disposed people [to wit, say what;[3] as, for example, for the purpose of prostitution]; against the peace, &c. [perhaps *adding*,[4] to the common nuisance of all the people].[5]

§ 1008. **Truancy**, — as to, see the note.[6]

§ 1009. **Vagabond and Rogue**, — as to, see the note.[7]

§ 1010. **Vagrancy.** — The statutes creating this offence differ in their terms; and the indictment is required simply to cover, in due form, the interpreted[8] words on which it is drawn.[9] If, for example, it is made a misdemeanor for one having no apparent means of subsistence to neglect to apply himself to some honest calling, the averments may be, —

That A, &c. on, &c. at, &c. and thence continually until, &c. did, having no apparent means of subsistence, unlawfully neglect, fail, and refuse to apply himself to any honest calling, but did there during all said time habitually loiter around drinking-saloons and gambling-houses; against the peace, &c.[10]

[1] Crim. Law, I. § 501; Thomas *v.* The State, 55 Ala. 260; ante, § 823–826.

[2] Crim. Proced. II. § 874 *a*.

[3] Thomas *v.* The State, supra.

[4] Ante, § 775.

[5] For forms and precedents, see Crim. Proced. II. § 874 *a*; Thomas *v.* The State, supra; Commonwealth *v.* Norton, 13 Allen, 550; The State *v.* Dowers, 45 N. H. 543. **Feeding Armed Prowlers**, — see Vaughn *v.* The State, 3 Coldw. 102.

[6] O'Malia *v.* Wentworth, 65 Maine, 129.

[7] **Crim. Law, I.** § 515; Reg. *v.* Middlesex Justices, 2 Q. B. D. 516; Monck *v.* Hilton, 2 Ex. D. 268.

[8] Ante, § 32.

[9] For this and various expositions of the statutes, consult Taylor *v.* The State, 59 Ala. 19; In re Conroy, 54 How. Pr. 432; People *v.* Catholic Protectory, 61 How. Pr. 445; Toney *v.* The State, 60 Ala. 97; Ex parte Birchfield, 52 Ala. 377; In re Way, 41 Mich. 299; and the subsequent cases cited to this section.

[10] Brown *v.* The State, 2 Lea, 158. For other forms, see The State *v.* Custer, 65 N. C. 339; Walton *v.* The State, 12 Texas Ap. 117; Boulo *v.* The State, 49 Ala. 22.

For VOTING, see ELECTION OFFENCES.
WAGES, see CONSPIRACY — LABOR OFFENCES.

CHAPTER XCIII.

WAY.[1]

§ 1011. **Scope and Order of Chapter.** — It is within the scope of this chapter to consider so much as belongs to this volume of the offences against, I. The Ordinary and Turnpike Streets and Roads; II. The Railways; III. The Public Bridges; IV. The Public Squares and Pleasure-Grounds; V. The Rivers and other Ways by Water; VI. The Harbors and Public Ponds. But, before proceeding with this, let us, according to the common course of this volume, bring under contemplation a —

§ 1012. **General Formula for the Indictment.** — Such formula can be accurate only in outline, to be varied with the differing statutes and special facts; as, —

That A, &c. [ante, § 74–77], on, &c. [ante, § 80, and in many circumstances adding the continuando as at ante, § 81–84], at, &c. [ante, § 80], did unlawfully obstruct, &c. [setting out the obstruction;[2] *or*, neglect to keep in repair, &c. particularizing the condition of the way and its needs[3]] a certain public highway there duly established[4] [*or*, navigable river and public water-way for vessels (the pleader will ordinarily add its name); *or*, public common and pleasure-ground duly established; *or*, &c. according to

[1] For the direct expositions of the law of this subject, with the pleading, evidence, and practice, see Crim. Law, II. § 1264–1287; Crim. Proced. II. § 1042–1057. Incidental, Crim. Law, I. § 108, 173–175, 227, 236, 241, 244, 245, 265, 341, 419–421, 531, 792, 829, 1061, 1081; II. § 667, 669, 690; Crim. Proced. I. § 53, 63, 441, 469, 470, 486, 488 *e*; II. § 827; Stat. Crimes, § 20, 156, 164, note, 206, 284, 298, 301–303, 878, 906, 927, 928, 973.

[2] Crim. Proced. II. § 1052.

[3] Ib. § 1047.

[4] Ib. § 1045, 1051.

the fact], whereon the people were at all times entitled to be, travel, and pass, so that, &c. [according to the special fact]; to the common nuisance of all the people,[1] against the peace, &c. [ante, § 65–69].[2]

[1] Ante, § 775.

[2] For forms and precedents, see Archb. Crim. Pl. & Ev. 19th ed. 966, 968, 970, 980, 982, 984; 3 Chit. Crim. Law, 577–589, 594–641; 4 Went. Pl. 157–199, 222–224, 345; 6 Ib. 401, 405–418, 427; 2 Cox C. C. App. 3; 6 Ib. App. 23, 74, 75, 115; Rex v. H. P., Trem. P. C. 196; Rex v. Baxter, Trem. P. C. 196; Rex v. Fanshaw, Trem. P. C. 199; Rex v. Harvey, Trem. P. C. 197; Rex v. Essex, Trem. P. C. 205; Rex v. Stains, Trem. P. C. 207; Rex v. Norwich, Trem. P. C. 208; Reg. v. Sainthill, 2 Ld. Raym. 1174; Cumberland v. Rex, 3 B. & P. 354; Rex v. Stoughton, 2 Saund. 157; Rex v. Harrow, 4 Bur. 2090; Rex v. Stead, 8 T. R. 142; Rex v. West Riding of Yorkshire, 2 East, 342; Rex v. Liverpool, 3 East, 86; Rex v. Russell, 6 East, 427; Rex v. Salop, 13 East, 95; Rex v. Kent, 13 East, 220; Rex v. Winter, 13 East, 258; Rex v. Kent, 2 M. & S. 513; Rex v. Kerrison, 3 M. & S. 526; Rex v. St. Giles, 5 M. & S. 260; Rex v. Devon, 4 B. & C. 670; Rex v. Russell, 6 B. & C. 566; Rex v. Wright, 1 A. & E. 434; Rex v. Ward, 4 A. & E. 384, 408, note; Rex v. Tindall, 6 A. & E. 143; Reg. v. Barton, 11 A. & E. 343; Reg. v. Derbyshire, 2 Q. B. 745; Reg. v. Midville, 4 Q. B. 240; Reg. v. New Sarum, 7 Q. B. 941; Reg. v. Great North of England Railway, 9 Q. B. 315, 2 Cox C. C. 70; Reg. v. Ely, 15 Q. B. 827, 4 Cox C. C. 281; Reg. v. Turweston, 16 Q. B. 109, 4 Cox C. C. 349; Reg. v. Denton, 18 Q. B. 761, Dears. 3; Reg. v. Betts, 16 Q. B. 1022; Reg. v. Waverton, 17 Q. B. 562, 2 Den. C. C. 340, 5 Cox C. C. 400; Reg. v. Sturge, 3 Ellis & B. 734; Reg. v. Russell, 3 Ellis & B. 942; Reg. v. Ramsden, Ellis, B. & E. 949; Reg. v. Longton Gas Co. 2 Ellis & E. 651; Reg. v. Train, 2 B. & S. 640; Reg. v. Stephens, 7 B. & S. 710; Reg. v. Clark, Law Rep. 1 C. C. 54, 10 Cox C. C. 338; Reg. v. Hadfield, Law Rep. 1 C. C. 253, 11 Cox C. C. 574; Reg. v. Hardy, Law Rep. 1 C. C. 278, 11 Cox C. C. 656; Reg. v. Gate Fulford, Dears. & B. 74, 7 Cox C. C. 230; Reg. v. Bradford, Bell, 268, 8 Cox C. C. 309; Reg. v. Fullford, Leigh & C. 403, 9 Cox C. C. 453; Reg. v. Holroyd, 2 Moody & R. 339; Rex v. Upton-on-Severn, 6 Car. & P. 133; Reg. v. Botfield, Car. & M. 151; Reg. v. Maybury, 4 Fost. & F. 90; Reg. v. Dobson, 1 Cox C. C. 251; Reg. v. United Kingdom Elec. Tel. 9 Cox C. C. 137; Reg. v. Burrell, 10 Cox C. C. 462; Reg. v. Monaghan, 11 Cox C. C. 608; Reg. v. Spence, 11 U. C. Q. B. 31; Reg. v. Great Western Railway, 21 U. C. Q. B. 555; Reg. v. Ottawa, &c. Road, 42 U. C. Q. B. 478.

Alabama. — The State v. Bell, 5 Port. 365; Freeman v. The State, 6 Port. 372; Prim v. The State, 36 Ala. 244; Blann v. The State, 39 Ala. 353; Nowlin v. The State, 49 Ala. 41; Malone v. The State, 51 Ala. 55, 56.

Arkansas. — The State v. Holman, 29 Ark. 58.

Connecticut. — The State v. Brown, 16 Conn. 54.

Indiana. — Butler v. The State, 17 Ind. 450; The State v. Mathis, 21 Ind. 277; Neaderhouser v. The State, 28 Ind. 257, 259; Allison v. The State, 42 Ind. 354; The State v. Day, 52 Ind. 483; The State v. Baker, 58 Ind. 417; The State v. Maincy, 65 Ind. 404; Mauck v. The State, 66 Ind. 177; The State v. Stewart, 66 Ind. 555.

Iowa. — The State v. Davenport, &c. Railroad, 47 Iowa, 507.

Maine. — The State v. Sturdivant, 21 Maine, 9; The State v. Portland, &c. Railroad, 58 Maine, 46; The State v. Grand Trunk Railway, 59 Maine, 189.

Maryland. — Wroe v. The State, 8 Md. 416.

Massachusetts. — Commonwealth v. Springfield, 7 Mass. 9; Commonwealth v. Gowen, 7 Mass. 378; Commonwealth v. Hall, 15 Mass. 240; Commonwealth v. North Brookfield, 8 Pick. 463; Commonwealth v. Newburyport Bridge, 9 Pick. 142; Commonwealth v. Fisk, 8 Met. 238; Commonwealth v. Allen, 11 Met. 403; Commonwealth v. Belding, 13 Met. 10; Commonwealth v. King, 13 Met. 115; Commonwealth v. Alger, 7 Cush. 53; Commonwealth v. Central Bridge, 12 Cush. 242; Commonwealth v. Hicks, 7 Allen, 573; Commonwealth v. Newburyport, 103

§ 1013. **As to which.** — While this formula will be suggestive, and it has served as ground for collecting the references to the precedents in the order of the States, the pleader's chief reliance should be on the forms to follow. And —

Abatement — (Continuando — Description of Place). — If there is a probability that a judgment of abatement may be asked, the thing to be abated should be alleged as continuing; and, beyond this, if an officer is to be required, by a writ or order from the court, to remove an obstruction or perform any other act of the sort, the indictment must so specify the place and thing that he can identify them, — particulars not by the better opinion essential in other circumstances.[1]

Mass. 129; Commonwealth *v.* Bakeman, 105 Mass. 53; Commonwealth *v.* Killian, 109 Mass. 345; Commonwealth *v.* Gloucester, 110 Mass. 491; Commonwealth *v.* Goodnow, 117 Mass. 114.

Michigan. — People *v.* Carpenter, 1 Mich. 273.

Mississippi. — McCarty *v.* The State, 37 Missis. 411, 419.

Missouri. — The State *v.* Fleetwood, 16 Misso. 448; The State *v.* Tuley, 20 Misso. 422; The State *v.* Levens, 22 Misso. 469; The State *v.* Risley, 72 Misso. 609; The State *v.* McCray, 74 Misso. 303.

Montana. — Territory *v.* Ashby, 2 Mon. Ter. 89, 90.

New Hampshire. — The State *v.* Lord, 16 N. H. 357; The State *v.* Hall, 2 Fost. N. H. 384; The State *v.* Canterbury, 8 Fost. N. H. 195; The State *v.* Wentworth, 37 N. H. 196; The State *v.* Northumberland, 46 N. H. 156; The State *v.* Beckman, 57 N. H. 174.

New Jersey. — The State *v.* Turnpike, 1 Harrison, 222.

New York. — Waterford, &c. Turnpike *v.* People, 9 Barb. 161; People *v.* Branchport, &c. Plankroad, 5 Parker C. C. 604; People *v.* New York Central, &c. Railroad, 74 N. Y. 302.

North Carolina. — The State *v.* Pool, 2 Dev. 202; The State *v.* Halifax, 4 Dev. 345, 346; The State *v.* Cobb, 1 Dev. & Bat. 115; The State *v.* King, 3 Ire. 411; The State *v.* Patton, 4 Ire. 16; The State *v.* Yarrell, 12 Ire. 130; The State *v.* Hinson, 82 N. C. 597; The State *v.* McDowell, 84 N. C. 798.

Ohio. — Matthews *v.* The State, 25 Ohio State, 536.

Pennsylvania. — Respublica *v.* Arnold, 3 Yeates, 417; Werfel *v.* Commonwealth, 5 Binn. 65; Commonwealth *v.* Eckert, 2 Browne, Pa. 249; Commonwealth *v.* Church, 1 Barr, 105; Commonwealth *v.* Bowman, 3 Barr, 202; Commonwealth *v.* Reed, 10 Casey, Pa. 275; Phillips *v.* Commonwealth, 8 Wright, Pa. 197; Zug *v.* Commonwealth, 20 Smith, Pa. 138; Commonwealth *v.* Wentworth, Brightly, 318.

Rhode Island. — The State *v.* Peckham, 9 R. I. 1.

Tennessee. — The State *v.* Murfreesboro', 11 Humph. 217; The State *v.* McElroy, 3 Heisk. 69; The State *v.* Bellville, 7 Baxter, 548.

Texas. — Menly *v.* The State, 3 Texas Ap. 382.

Vermont. — The State *v.* Wilkinson, 2 Vt. 480; The State *v.* Day, 3 Vt. 138; The State *v.* Whittingham, 7 Vt. 390; The State *v.* Newfane, 12 Vt. 422; The State *v.* Bosworth, 13 Vt. 402; The State *v.* Vermont Central Railroad, 27 Vt. 103; The State *v.* Vermont Central Railroad, 28 Vt. 583; The State *v.* Jericho, 40 Vt. 121.

West Virginia. — Parkinson *v.* The State, 2 W. Va. 589.

Wisconsin. — Stoughton *v.* The State, 5 Wis. 291.

[1] Crim. Proced. II. § 866, 870 871; ante, § 442 and note.

I. *The Ordinary and Turnpike Streets and Roads.*

§ 1014. **Obstructing Common Highway.** — For the obstruction of an ordinary street, a common English form for the indictment is, —

That A, &c. on, &c. and thence continually until the day of the finding of this indictment [1] [with force and arms [2]], at, &c. in a certain street there called M Street, being the Queen's common highway, used for all the liege subjects of our Lady the Queen, with their horses, coaches, carts, and carriages, to go, return, pass, repass, ride, and labor, at their free will and pleasure,[3] unlawfully and injuriously [4] did, &c. [setting out the obstruction; as, put and place three empty drays, and did there during all said time and every day thereof unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in and upon the Queen's common highway aforesaid for the space of several hours, to wit, for the space of five hours, on each of the said days [5]]; whereby the Queen's common highway aforesaid was during all said time and on each day thereof there obstructed and straitened, so that the liege subjects of our Lady the Queen could not go, return, pass, repass, ride, and labor, with their horses, coaches, carts, and other carriages, in, through, and along the Queen's common highway aforesaid, as they ought and were wont and accustomed to do; to the, &c. [the proper conclusion [6] is given ante, § 775, 777].[7]

§ 1015. **Another.** — It is not possible to construct a form which the judicious pleader will not more or less modify with the changing facts, as well as, if on a statute, adapt to the statutory terms. Ordinarily, with us, it will be judicious to allege, —

That A, &c. on, &c.[8] at, &c. in and upon a certain public highway there duly established, called M Street [*or*, leading from N to O [9]], did unlaw-

[1] I have adapted the form of the continuando to the suggestions ante, § 82–84.

[2] Needless. Ante, § 43.

[3] Whatever be the propriety of this long setting out of the uses of the highway where, as in England, there are differing uses established by prescription, it is needless with us. The uses of our highways are, in general, ascertainable as of law, and they are uniform. Therefore it suffices, and it is deemed better, simply to say, "in a certain duly established highway and public street there, called M Street," omitting the other matter in the text. Crim. Proced. II. § 1045, 1051.

[4] I should practically retain "unlawfully," though it is not necessary, unless to cover the terms of a statute. Crim. Proced. I. § 503; II. § 543. For the superfluous "injuriously" it would be difficult to discover any sort of reason.

[5] Not all of this is necessary.

[6] In the form before me there is a good deal of surplusage here.

[7] Archb. Crim. Pl. & Ev. 10th ed. 640, 19th ed. 966.

[8] The reader will perceive that, though the continuando is not at this its usual place, it is given further on. But in many cases it is better here, and in some others it is best omitted.

[9] Something more identifying in de-

fully put and place, &c. [as in the last section; *or*, did unlawfully erect, put, and place a certain stall for the exposing to sale and selling of fruit and confectionery;[1] *or*, build and erect across said highway a certain fence;[2] *or*, dig and cut a certain deep ditch along and across said highway;[3] *or*, cause and permit divers wagons, carts, and carriages to the number of fifty and more and many horses to stand and remain;[4] *or*, dig up and remove from said highway great quantities, to wit, one thousand cords and more, of stone and earth;[5] *or*, &c. setting out the injury or obstruction according to the fact], whereby said common highway was then and there rendered dangerous and impossible to be travelled [*or*, &c. stating the particular effect], and did then and thence continually until the day of the finding of this indictment, and still does, there unlawfully continue the same; to the common nuisance of all the people [ante, § 775, 777], against the peace, &c.[6]

§ 1016. **Turnpike Roads** — have the same protection as ordinary public roads, and follow the same rules, except as their

scription than an allegation which would be sustained by proof of any highway in the county is, by a part of our courts, required. Crim. Proced. II. § 1051; The State *v.* Stewart, 66 Ind. 555. Therefore in a State where the question has not been adjudged, the prudent course is to follow one of the forms in the text, or devise some equivalent.

[1] Commonwealth *v.* Wentworth, Brightly, 318.

[2] The State *v.* Risley, 72 Misso. 609; Commonwealth *v.* Gowen, 7 Mass. 378; The State *v.* Stewart, 66 Ind. 555; Rex *v.* Stead, 8 T. R. 142; Reg. *v.* Spence, 11 U. C. Q. B. 31; 3 Chit. Crim. Law, 607, 610, 611, 618.

[3] The State *v.* Day, 52 Ind. 483; Commonwealth *v.* Belding, 13 Met. 10; 3 Chit. Crim. Law, 611.

[4] Rex *v.* Russell, 6 East, 427; 3 Chit. Crim. Law, 625, 626.

[5] Reg. *v.* Train, 2 B. & S. 640.

[6] For forms and precedents, see a large part of the places referred to ante, § 1012. For some particular obstructions, see, in addition to the places already cited to this section, —

Digging, Removing Dirt, &c. — in and from street. 3 Chit. Crim. Law, 615, 620; Rex *v.* Winter, 13 East, 258.

Building, — permanent or temporary, obstruction partial or full. 3 Chit. Crim. Law, 612, 615, 617; 4 Went. Pl. 191; Reg. *v.* Fullford, Leigh & C. 403, 9 Cox C. C. 453; Commonwealth *v.* Goodnow, 117 Mass. 114; The State *v.* Vermont Central Railroad, 27 Vt. 103; Rex *v.* Wright, 1 A. & E. 434.

Gate, — obstructing travel by erecting a. 3 Chit. Crim. Law, 618; 4 Went. Pl. 197, 198; 6 Ib. 401, 402, 405.

Timber, Dirt, &c. — Putting, in street. 3 Chit. Crim. Law, 622, 625; Rex *v.* Harvey, Trem. P. C. 197; Commonwealth *v.* King, 13 Met. 115.

Flooding, — by damming streams, and other like means. Respublica *v.* Arnold, 3 Yeates, 417; The State *v.* Lord, 16 N. H. 357; Prim *v.* The State, 36 Ala. 244; Reg. *v.* Maybury, 4 Fost. & F. 90.

Running Horse, — so as to interrupt travel. The State *v.* Fleetwood, 16 Misso. 448.

Altering Course. — Freeman *v.* The State, 6 Port. 372.

Over Railroad, — carrying street, by bridge, improperly. People *v.* New York Central, &c. Railroad, 74 N. Y. 302.

Engines and Cars, — Railroad obstructing highway by. The State *v.* Grand Trunk Railway, 59 Maine, 189.

Contrary to Charter, — acts of railway company, obstructing common road by. Reg. *v.* Great North of England Railway, 9 Q. B. 315, 2 Cox C. C. 70.

Footway, — obstructing. Reg. *v.* Longton Gas Co. 2 Ellis & E. 651; Reg. *v.* Betts, 16 Q. B. 1022.

charters otherwise provide;[1] so that no separate forms of the indictment for obstructing them are here required.[2]

§ 1017. **Non-repair.** — The allegations for non-repair are commonly in the precedents more expanded than is strictly necessary, nor are the authorities entirely distinct as to what they must contain. In "Criminal Procedure"[3] this is duly explained; and it will suffice for this place to set down what is believed to satisfy all opinions, mainly following a much-employed English precedent; thus, —

That A, &c. [in most cases a municipal corporation, ante, § 76, 79] on, &c. and thence continually until the day of the finding of this indictment, at, &c. was and still is under the legal duty to keep in due and proper repair[4] a certain common highway called M Street [*or*, &c. as at ante, § 1015], there during all said time duly established and being [for, and used by, all the people, with their horses, coaches, carts, and other carriages to go, return, pass, repass, ride, and labor at their free will and pleasure[5]]; and that a certain part of the said common highway [called N Lane, situate, lying, and being in the town of O in said county, extending from a certain field there, called ——, unto a certain bridge called —— bridge, containing in length forty yards, and in breadth eight yards[6]], was, during all said

[1] Crim. Law, II. § 1270.

[2] **Gate.** — For unlawfully shutting a gate, The State *v.* Day, 3 Vt. 138; The State *v.* Bosworth, 13 Vt. 402.

[3] Crim. Proced. II. § 1043–1048.

[4] There may be circumstances in which the averment of this duty is required, but it is not commonly. Crim. Proced. II. § 1044. Perhaps, where it is essential, some will choose to say also how the duty arose. Rex *v.* Stoughton, 2 Saund. Wms. ed. 157 and notes; 3 Chit. Crim. Law, 587.

[5] The matter in these brackets is common in our own precedents as well as in the English. Still it is believed not to be necessary in a State where only one sort of highway is known to the law. Crim. Proced. II. § 1045.

[6] This minute description of the locality of the defect does not accord with the precedents for other offences, where no writ or order to an officer commanding him to do something at the place is to be asked for (ante, § 1013); and though there are probably authorities which hold it to be necessary, they are believed not to be well founded. Crim. Proced. II. § 1045–1047. Still, if the pleader doubts, or if there is reason to fear that his court will hold to the contrary or even doubt, safety lies in the insertion of the allegation. **Defects at Various Places — (Additional Counts).** — In Archbold it is said: "If there be other parts of the highway out of repair, within the same parish [in a case where the parish is the party indicted], insert other counts specifying them." Archb. Crim. Pl. & Ev. 19th ed. 970. To this no authorities are cited. In reason, the direction cannot be sound; but, on the other hand, the different places should be specified, one after the other, in the same count. A second count is, in essence, a second indictment. Crim. Proced. I. § 421, 422. It is never good to insert the part of an offence in one count and the rest in another. But what is deemed a complete offence is charged in each count. Now, if a highway is in the entire length of what is within the jurisdiction of the court defective, no one maintains that there are as many separate offences of non-repair as there are feet or rods of such defective way. Then, if there are defective places, with intervals of good road between, is it otherwise? To hold that then there is a separate offence for each defective place is equally absurd with the other. It seems to me, therefore, that

time, and still is, there very ruinous, miry, deep, broken, and in great decay, for want of due reparation and amendment of the same; so that the people could not there during all said time go, return, pass, repass, ride, and labor with their horses, coaches, carts, and other carriages in, through, and along the said common highway as they ought and were wont and accustomed to do, without great danger of their lives, and the loss of their goods;[1] to the common nuisance of all the people [ante, § 775, 777, 1015], against the peace, &c.[2]

§ 1018. **Not making Road.** — Similar to the foregoing is the indictment for neglecting to open and work a highway which by competent authority has been laid out.[3]

§ 1019. **Neglects by Road Officers** — are a species of official misconduct, within explanations already made.[4] Also the indictment may partake, more or less according to the circumstances, of that for non-repair just given.[5]

§ 1020. **Travellers Meeting.** — For a violation of the statutory regulation, that, "whenever any persons shall meet each other on any road, travelling with carriages, &c. each person shall seasonably drive his carriage, &c. to the right of the middle of the

the pleader ought to be safe, and before most courts will be, if he charges all the defects in one count; and that the peril lies in the opposite course.

[1] The allegation here is needlessly verbose; but, whatever we deem of its necessity, I should practically preserve something of it.

[2] Archb. Crim. Pl. & Ev. 10th ed. 642, 19th ed. 970. For other forms and precedents, see 3 Chit. Crim. Law, 577–589; 4 Went. Pl. 157–179, 184; 6 Ib. 406–416; 6 Cox C. C. App. 74, 75; Rex *v.* Stoughton, supra; Rex *v.* Harrow, 4 Bur. 2090; Rex *v.* St. Giles, 5 M. & S. 260; Rex *v.* Liverpool, 3 East, 86; Rex *v.* West Riding, 7 East, 588; Reg. *v.* Barton, 11 A. & E. 343; Reg. *v.* Midville, 4 Q. B. 240; Reg. *v.* Turweston, 16 Q. B. 109, 4 Cox C. C. 349; Reg. *v.* Waverton, 17 Q. B. 562, 2 Den. C. C. 340, 5 Cox C. C. 400; Reg. *v.* Denton, 18 Q. B. 761, Dears. 3; Reg. *v.* Gate Fulford, Dears. & B. 74, 7 Cox C. C. 230; Reg. *v.* Ramsden, Ellis, B. & E. 949; Rex *v.* Upton-on-Severn, 6 Car. & P. 133.

Alabama. — Nowlin *v.* The State, 49 Ala. 41.

Massachusetts. — Commonwealth *v.* Springfield, 7 Mass. 9; Commonwealth *v.* North Brookfield, 8 Pick. 463.

New Hampshire. — The State *v.* Northumberland, 46 N. H. 156.

New Jersey. — The State *v.* Turnpike, 1 Harrison, 222.

New York. — Waterford, &c. Turnpike *v.* People, 9 Barb. 161; People *v.* Branchport, &c. Plankroad, 5 Parker C. C. 604.

North Carolina. — The State *v.* Pool, 2 Dev. 202; The State *v.* Patton, 4 Ire. 16; The State *v.* McDowell, 84 N. C. 798.

Pennsylvania. — Phillips *v.* Commonwealth, 8 Wright, Pa. 197.

Tennessee. — The State *v.* Murfreesboro', 11 Humph. 217; The State *v.* Bellville, 7 Baxter, 548.

West Virginia. — Parkinson *v.* The State, 2 W. Va. 589.

[3] For precedents, see The State *v.* Newfane, 12 Vt. 422; The State *v.* Jericho, 40 Vt. 121.

[4] Ante, § 680 et seq.

[5] For precedents, see 3 Chit. Crim. Law, 587, 588; 4 Went. Pl. 178, 345; The State *v.* Tuley, 20 Misso. 422; The State *v.* Levens, 22 Misso. 469; The State *v.* Halifax, 4 Dev. 345, 346; The State *v.* McElroy, 3 Heisk. 69.

travelled part of such road, so that the respective carriages, &c. may pass each other without interference," the averments may be, —

That on, &c. at, &c. A, &c. and one X, travelling with their respective wagons, met each other on a certain public road, whereupon the said A unlawfully did not then and there at said meeting seasonably drive his said wagon to the right of the middle of the travelled part of said road, so that the said respective wagons could pass each other without interference; by reason of which neglect the wagon of the said A did then and there at said meeting interfere with that of the said X, and break that of the said X into pieces; against the peace, &c.[1]

II. *The Railways.*

§ 1021. **Obstruction on Track.** — Doubtless the putting of an obstruction on the track of a railway, the same as of any other road, is indictable at the common law.[2] But the probable consequences are so much more serious that we have statutes specially against it; as, for example, making it a felony to "wilfully and maliciously place any obstruction on the track of any railroad, or, &c. whereby the life of any person may be endangered." On this the indictment may charge, —

That A, &c. on, &c. at, &c. did wilfully, maliciously, and feloniously place upon the track of the X Railroad two pieces of wood called railroad sleepers, and one piece of wood called a post [*or*, two iron rails, two large stones, and two large pieces of wood, *or*, &c. according to the fact], to the obstruction of said railroad track, whereby the lives of many and sundry persons travelling on said railroad, whose names are to the jurors unknown, were then and there endangered; against the peace, &c.[3]

[1] Substantially following the form, which was adjudged good, in Commonwealth *v.* Allen, 11 Met. 403. It was held not to be necessary to describe more particularly the street and place of meeting.

[2] Crim. Law, II. § 1269, 1270.

[3] For precedents, see The State *v.* Wentworth, 37 N. H. 196; The State *v.* Beckman, 57 N. H. 174. There are some differences in the terms of the several statutes to punish this offence, and the pleader should carefully cover those on which he is proceeding. The English provision is, "Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or, &c. with intent . . . to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony." 24 & 25 Vict. c. 97, § 35. And a precedent for the indictment is, —

That A, &c. on, &c. at, &c. feloniously, unlawfully, and maliciously did put and place a piece of wood upon a certain railway called X [in the parish of N in the county of M, *not necessary* where the locality is stated at the beginning of the form], with intent thereby then and there to obstruct, upset, overthrow, and injure a certain engine and certain carriages using the said railway; against the peace, &c.

See, for this form, with the statute,

§ 1022. **Other Offences.** — There are some other offences within this sub-title, but no further forms are here necessary.[1]

III. *The Public Bridges.*

§ 1023. **Non-repair, &c.** — Bridges are, in general, parts of the highways;[2] and the indictment for the non-repair, not building, obstructing, and the like is substantially as explained under the first sub-title. No separate forms are needed.[3]

IV. *The Public Squares and Pleasure-Grounds.*

§ 1024. **Erecting a Building.** — An indictment adjudged good charged, in substance, but in more words than necessary, —

That A, &c. on, &c. at, &c. did unlawfully and injuriously, in and upon a certain public square, being a common highway there, called the public

Archb. Crim. Pl. & Ev. 19th ed. 592, 593. In this instance, as in others where precedents are copied from this book, I have restored the allegation of place, rendered by late English statutes unnecessary. For other English forms, see Reg. *v.* Holroyd, 2 Moody & R. 339; Reg. *v.* Bradford, Bell, 268, 8 Cox C. C. 309; Reg. *v.* Hadfield, Law Rep. 1 C. C. 253, fuller in 11 Cox C. C. 574; Reg. *v.* Hardy, Law Rep. 1 C. C. 278, 11 Cox C. C. 656; Reg. *v.* Monaghan, 11 Cox C. C. 608. Throwing stones, &c. Reg. *v.* Clark, Law Rep. 1 C. C. 54, 10 Cox C. C. 338; 2 Cox C. C. App. 3.

Indiana. — Allison *v.* The State, 42 Ind. 354.

Massachusetts. — Commonwealth *v.* Hicks, 7 Allen, 573 (horse-railroad car); Commonwealth *v.* Bakeman, 105 Mass. 53; Commonwealth *v.* Killian, 109 Mass. 345.

Mississippi. — McCarty *v.* The State, 37 Missis. 411, 419.

North Carolina. — The State *v.* Hinson, 82 N. C. 597 (for shooting with pistol at railroad cars).

[1] For a form of indictment against a railroad corporation for putting down rails in an unauthorized manner, see The State *v.* Portland, &c. Railroad, 58 Maine, 46. Unreasonably neglecting to ring a bell or blow a steam-whistle while the train is crossing a public road, The State *v.* Vermont Central Railroad, 28 Vt. 583.

[2] Crim. Law, II. § 1269; Stat. Crimes, § 301.

[3] **Not Repairing.** — For forms and precedents, see 3 Chit. Crim. Law, 594, 595, 597, 599, 600; 4 Went. Pl. 178, 187, 188; 6 Ib. 427; Rex *v.* Fanshaw, Trem. P. C. 199; Rex *v.* Essex, Trem. P. C. 205; Rex *v.* Stains, Trem. P. C. 207; Rex *v.* Norwich, Trem. P. C. 208; Reg. *v.* Saintbill, 2 Ld. Raym. 1174; Cumberland *v.* Rex, 3 B. & P. 354; Rex *v.* Kerrison, 3 M. & S. 526; Rex *v.* West Riding of Yorkshire, 2 East P. C. 342; Rex *v.* Salop, 13 East, 95; Rex *v.* Kent, 13 East, 220; Reg. *v.* Derbyshire, 2 Q. B. 745; Reg. *v.* New Sarum, 7 Q. B. 941. *Alabama.* — Blann *v.* The State, 39 Ala. 353. *Indiana.* — Butler *v.* The State, 17 Ind. 450. *Massachusetts.* — Commonwealth *v.* Central Bridge, 12 Cush. 242; Commonwealth *v.* Newburyport, 103 Mass. 129. *North Carolina.* — The State *v.* King, 3 Ire. 411; The State *v.* Yarrell, 12 Ire. 130.

Not Building — or building improperly. 3 Chit. Crim. Law, 596; Rex *v.* Devon, 4 B. & C. 670; Commonwealth *v.* Newburyport Bridge, 9 Pick. 142; The State *v.* Canterbury, 8 Fost. N. H. 195; The State *v.* Whittingham, 7 Vt. 390.

Pulling down — Injuring. — 6 Cox C. C. App. 115.

square [situate, &c.[1]], put, place, and set up [and cause to be put, placed, and set up[2]] one large wooden building [forty feet and upwards in length and thirty feet and upwards in breadth[3]]; and the said building [so as aforesaid put, placed, and set up in and upon the aforesaid public square and common highway[4]] he the said A did thence continually until the day of the finding of this indictment [ante, § 81–84], [with force and arms[5]], there unlawfully and injuriously uphold, maintain, and continue, and still doth uphold, maintain, and continue; whereby the said public square being a common highway was, during all said time, and still is, greatly obstructed, narrowed, and straitened, so that the people could not and cannot go, return, pass, and repass, as they ought and were accustomed to do, in, upon, and through said public square being a common highway; to the common nuisance of all the people [ante, § 775, 777], against the peace, &c.[6]

§ 1025. **Other Injuries** — may be charged in like manner, but no separate forms need here be given.[7]

V. *The Rivers and other like Ways by Water.*

§ 1026. **Obstructing Navigable River.** — The allegations, following in substance the approved precedents, may be, —

That on, &c. and thence continually until the day of the finding of this indictment, at, &c. the part of the river X lying and being within said county was and is a public navigable river and common highway for all the people,[8] whereon to navigate, sail, row, pass, repass, and labor, at their will and pleasure, with their ships, barges, lighters, boats, wherries, and other vessels, without any impediment or obstruction whatsoever; whereupon A, &c. on, &c. aforesaid, at a certain place in said river there called N,[9] did [describe here the obstruction], and did continue the same there during all the time aforesaid and still does continue the same there; by means whereof the navigation and free passage of, in, through, along, and

[1] This part of the allegation was certainly needless. See ante, § 1012, 1014, 1015, 1017. Or, at least, it would suffice to say situate in the village of N. And see Crim. Proced. II. § 1052.

[2] Needless, and better omitted. Ante, § 139 and note, 829 and note.

[3] Needless. Crim. Proced. II. § 1052.

[4] Evidently the words in these brackets add nothing to the allegation.

[5] Unnecessary. Ante, § 43.

[6] The State *v.* Wilkinson, 2 Vt. 480.

[7] For laying dirt in a square, whereby a coach was overturned, 3 Chit. Crim. Law, 622. For building a fence on a public common, Commonwealth *v.* Fisk, 8 Met. 238. For destroying a tree growing on public grounds, Commonwealth *v.* Eckert, 2 Browne, Pa. 249.

[8] The English precedents say here, "from the time whereof the memory of man is not to the contrary, hath been an ancient river and the Queen's ancient and common highway for all the liege subjects of our Lady the Queen and her predecessors." It is not prescription which makes our navigable rivers highways, hence there can be no propriety in our following this form.

[9] As to stating the special locality, see ante, § 1013, 1015 and note, 1017 and note.

upon the said river and common highway there, during all said time, were and still are greatly straitened, obstructed, and confined [so that the people navigating, sailing, rowing, passing, repassing, and laboring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river and common highway there during the time aforesaid could not, nor yet can, go, navigate, sail, row, pass, repass, and labor with their ships, barges, lighters, boats, wherries, and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do[1]]; to the common nuisance of all the people [ante, § 775, 777], against the peace, &c.[2]

§ 1027. **Obstructing Creek.** — A statute made it an indictable misdemeanor to "fell timber in, or otherwise obstruct the channel of, Hogan's creek in the county of Caswell;" and it was good to allege, —

That A, &c. on, &c. at, &c. in the county of Caswell, unlawfully and maliciously did fell timber in the channel of Hogan's creek there, and did then and there, by such felling of timber, obstruct the channel of said creek; against the peace, &c.[3]

§ 1028. **Other Watercourses.** — The obstruction or diversion of other watercourses is sometimes ground for indictment, but no further forms are here required.[4]

VI. *The Harbors and Public Ponds.*

§ 1029. **In General.** — The indictment for neglects and injuries to these public ways and waters follows so closely the forms

[1] The matter in these brackets is taken from Archbold's form, and is common. I can discover no reason for deeming it necessary. Certainly it may be greatly abridged.

[2] For forms and precedents, see Archb. Crim. Pl. & Ev. 10th ed. 641, 19th ed. 968; 3 Chit. Crim. Law, 633–641; Rex *v.* Baxter, Trem. P. C. 196; Rex *v.* Russell, 6 B. & C. 566; Rex *v.* Ward, 4 A. & E. 384, 408, note; Reg. *v.* Stephens, 7 B. & S. 710; Reg. *v.* Dohson, 1 Cox C. C. 251.

Alabama. — The State *v.* Bell, 5 Port. 365.

Indiana. — Neaderhouser *v.* The State, 28 Ind. 257, 259.

Massachusetts. — Commonwealth *v.* Gloucester, 110 Mass. 491.

Pennsylvania. — Werfel *v.* Commonwealth, 5 Binn. 65; Commonwealth *v.* Church, 1 Barr, 105; Zug *v.* Commonwealth, 20 Smith, Pa. 138.

[3] The State *v.* Cobb, 1 Dev. & Bat. 115, omitting from the form as it stands in the book of reports some obvious surplusage.

[4] For diverting watercourse, 3 Chit. Crim. Law, 640; 4 Went. Pl. 222–224; 6 Cox C. C. App. 75. Not cleansing, 3 Chit. Crim. Law, 603. Stopping, 3 Chit. Crim. Law, 638; Stoughton *v.* The State, 5 Wis. 291. Cutting gap in bank, 3 Chit. Crim. Law, 621. Canals, as to, 6 Cox C. C. App. 23; Commonwealth *v.* Reed, 10 Casey, Pa. 275.

already given in this chapter, that it would be little less than waste of space to add to them by averments special to the present sub-title. In the note,[1] some precedents are referred to; but the pleader, by following the analogies of the preceding forms, can readily construct whatever else he may have occasion for. The principles and outlines thus appearing, the special adaptations will be easy.

[1] Suffering obstructions to harbor, so that vessels cannot enter, 3 Chit. Crim. Law, 604. Erecting wall, 4 Went. Pl. 190; Reg. *v.* Russell, 3 Ellis & B. 942. Obstructing harbor by wharf, The State *v.* Sturdivant, 21 Maine, 9. Other obstructions, Rex *v.* Tindall, 6 A. & E. 143; Commonwealth *v.* Alger, 7 Cush. 53; Commonwealth *v.* Gloucester, 110 Mass. 491.

For WHITES AND BLACKS INTERMARRYING, see ante, § 739.
WOMEN, see RAPE AND CARNAL ABUSE — SEDUCTION AND ABDUCTION.
WORKMEN, see CONSPIRACY — LABOR OFFENCES.
WORSHIP, see DISTURBING MEETINGS.

BOOK IV.

BEFORE AND AFTER.

CHAPTER XCIV.

STEPS BY THE DEFENDANT BEFORE VERDICT.

§ 1030. **What for Chapter and how divided.** — We shall in this chapter consider, in the following order, I. The Motion to Quash the Indictment; II. The Plea to the Jurisdiction; III. Pleas in Abatement; IV. Demurrers; V. Pleas in Bar; VI. The General Issue; VII. The Plea of *Nolo Contendere;* VIII. Pleadings subsequent to the Pleas; IX. Setting up Insanity in Defence; X. The Change of Venue; XI. The Application for a Continuance.

I. *The Motion to Quash the Indictment.*[1]

§ 1031. **Form of Motion.** — It being within the judicial discretion of the court to quash an indictment without motion, or

[1] Direct expositions, Crim. Proced. I. 264 *k*, 264 *l*, 269, 425, 442, 455, 713, § 758–774. Incidental, Crim. Law, I. 715, 882, 1371; II. § 872; Stat. Crimes, § 1014, 1027; Crim. Proced. I. § 114, § 262.

to refuse on motion,[1] there can be and is no one form for the motion indispensable. It may follow the usages of the particular tribunal as to other motions; thus, after entitling the cause, —

And now comes the said A [the defendant] and moves to quash the said indictment, for that, &c. [particularizing the reasons].[2]

§ 1032. **Form of Entry.** — If the court quashes the indictment, its order upon the record simply states the fact in brief; as, in one case, where the quashing was as to one of several defendants, it was in substance, —

After hearing [the respective counsel], it is ordered that the indictment in this cause be, and the same is hereby, quashed as to the defendant C.[3]

II. *The Plea to the Jurisdiction.*[4]

§ 1033. **Commonly Needless — (Distinctions).** — There is a very narrow margin in criminal cases, and in civil a wider one, of jurisdictional objections which, pertaining to what is supposed to be the mere convenience of the parties, they may waive. But, aside from this sort of exception, a court without jurisdiction in a cause can take no step in it valid in law; and, as well without plea as with, it will be dismissed or quashed whenever, in any stage of it, the fact appears on the face of the record, or is in any other permissible way brought to the judicial notice.[5] Even it is said that, as late as after the general issue is pleaded, the court will receive affidavits of facts to sustain a motion to quash the indictment on this ground.[6] Therefore, whatever defendants may do at their election, seldom will they be under the necessity of pleading a want of jurisdiction in order to procure, for this cause, a dismissal of the proceedings.[7]

§ 1034. **Form.** — The common form of the plea, to which the

[1] Crim. Proced. I. § 758, 759, 761.

[2] For forms, see Commonwealth *v.* Legassy, 113 Mass. 10; People *v.* Moody, 5 Parker C. C. 568, 571; Pierce *v.* The State, 12 Texas, 210; The State *v.* Rutherford, 13 Texas, 24; Davis's Case, Chase Dec. 1, 84, 85; United States *v.* Pond, 2 Curt. C. C. 265, 266.

[3] Coats *v.* People, 4 Parker C. C. 662, 667. For another form, see People *v.* Moody, 5 Parker C. C. 568, 571.

[4] For various questions of jurisdiction, see Crim. Law, I. § 99–203, 1028, 1029; II. § 1022; Crim. Proced. I. § 50, 96, 123, 228, 236–239, 314 *a*–316, 375, 664, 724, 772, 893, 1350; II. § 910 *a*, 914; Stat. Crimes, § 84, note, 92 *b*, 112, 141, 142, 164, 180, 197, 198, 804, 810. Concerning the plea to the jurisdiction, Crim. Proced. I. § 736, 746, 794.

[5] Crim. Law, I. § 1028; Crim. Proced. I. § 50, 96, 123, 316, 772, 893.

[6] Reg. *v.* Heane, 4 B. & S. 947.

[7] Archb. Crim. Pl. & Ev. 19th ed. 134.

prosecuting officer may reply or demur, as the case requires, is, after entitling it, —

And the said A [the defendant], in his own proper person, comes here into court, and, having heard the said indictment read, says, that the court here ought not to take cognizance of the felony [*or*, misdemeanor, *or*, &c. giving any other proper designation] in the said indictment specified; because, protesting that he is not guilty of the same, nevertheless the said A says, that, &c. [setting out the matter showing the want of jurisdiction, and, in cases where there is a jurisdiction in another tribunal, specifying it [1]]; and this the said A is ready to verify. Wherefore he prays judgment if the court here will or ought to take cognizance of the indictment aforesaid, and that he may be dismissed and discharged therefrom.[2]

§ 1035. **Entry of Withdrawal of Juror and Not Guilty to plead to Jurisdiction.** — The withdrawal of pleas to admit of other steps is explained in "Criminal Procedure." [3] In an English case is the following entry, given here in exact words: —

"Upon the motion of Charles Hamilton Gordon, esquire, and —— Jodrell, esquire, being assigned as counsel for the defendants in this cause,

[1] Rex *v.* Johnson, 6 East, 583, 597; Mostyn *v.* Fabrigas, Cowp. 161, 172; Heilman *v.* Martin, 2 Ark. 158; Fields *v.* Walker, 23 Ala. 155; Rea *v.* Hayden, 3 Mass. 24; Lawrence *v.* Smith, 5 Mass. 362; Jones *v.* Winchester, 6 N. H. 497. I have stated the doctrine in the text as I understand it, though there is room for question as to what is its exact form. In Rex *v.* Johnson, supra, which is the only criminal case among those cited in this note, the court seems to have deemed the doctrine universal; and, no competent jurisdiction appearing in the plea, it was pronounced ill as amounting to an argumentative general issue. Chitty, treating of civil pleading, says this rule applies to actions in the "superior courts;" but, in those in an "inferior court," "it was sufficient to allege that the cause of action accrued out of its jurisdiction, without showing the jurisdiction to which the plaintiff should have resorted." 1 Chit. Pl. 445. As to another point in Rex *v.* Johnson, the books show that, in criminal cases, pleas to the jurisdiction have always been common, quite irrespective of the question whether the same matter might have been taken advantage of or not on "not guilty," on the motion to quash, or on any of the other steps open to defendants.

[2] For precedents, involving a considerable variety of circumstances, see Archb. Crim. Pl. & Ev. 19th ed. 134; 4 Chit. Crim. Law, 505-516; 4 Went. Pl. 63; Rex *v.* Williams, Trem. P. C. 48, 52; Rex *v.* Devonshire, Trem. P. C. 188; Rex *v.* D. Trem. P. C. 271; Rex *v.* Holles, Trem. P. C. 294, 298, 300; Rex *v.* Fitzharris, 8 Howell St. Tr. 243, 251, 263; Rex *v.* Kinloch, Foster, 16, 18, 19; Rex *v.* Johnson, 6 East, 583.

Massachusetts. — Commonwealth *v.* Johnson, 8 Mass. 87.

Michigan. — Washburn *v.* People, 10 Mich. 372.

Mississippi. — Sam *v.* The State, 31 Missis. 480.

New York. — People *v.* Fish, 4 Parker C. C. 206; People *v.* Gardiner, 6 Parker C. C. 143.

Pennsylvania. — Clark *v.* Commonwealth, 5 Casey, Pa. 129, 130.

United States. — United States *v.* Carter, 4 Cranch C. C. 732; United States *v.* Morris, 1 Curt. C. C. 23; United States *v.* Rogers, 4 How. U. S. 567, Hemp. 450; United States *v.* Penn, 4 Hughes, 491, 492.

[3] Crim. Proced. I. § 124, 747, 798, 801. For a form of the motion, see The State *v.* Hale, 44 Iowa, 96.

and by their consent, and also at the desire and request and by the consent of the defendants now at the bar here, and also by the consent of Mr. Attorney-general on behalf of the King, it is ordered by the court here, that Richard Foy the last of the jurors sworn and impanelled in this cause be withdrawn out of the panel, and that the rest of the jurors in this cause be discharged; no evidence whatsoever having been given to the said jury in this cause either on the part of the King or of the defendants. And it is farther ordered by the court here, that the said defendants have leave to withdraw their pleas of not guilty by them formerly pleaded to the indictment in this cause, and have leave to plead to the jurisdiction of this court; and that the said defendants have time till to-morrow to put in such plea; and that they deliver copies of such plea to Mr. Sharpe, solicitor for the King in this cause, by eight of the clock this evening. And thereupon the said defendants do now here at the bar withdraw their said pleas of not guilty, in order to put in such plea to the jurisdiction of this court as aforesaid." [1]

III. *Pleas in Abatement.*[2]

§ 1036. **How** — these pleas should be constructed we saw in another place.[3] One of them, now in consequence of modern legislation less used than formerly, is for —

§ 1037. **Misnomer.**[4] — The form, after the entitling of the cause, is, —

And B [giving the true name], who is indicted by the name of A, in his own proper person comes into court here, and, having heard the said indictment read, says, that his name is and from his nativity hitherto has been B, by which name he has always been called and known;[5] without this, that he the said B now is, or at any time hitherto has been, called or known by the name of A, as by said indictment is supposed, and this he the said B is ready to verify. Wherefore he prays judgment of the said indictment, and that the same may be quashed.[6]

[1] Rex *v.* Kinlocb, Foster, 16, 17.

[2] Crim. Proced. I. § 730, 738–740, 745, 746, 749, 754–757, 783, 789–793, 883–885, 1048.

[3] Ib. § 745, 793; Dolan *v.* People, 64 N. Y. 485, 492; United States *v.* Hammond, 2 Woods, 197, 201.

[4] For the doctrine of the name and addition, see Crim. Proced. I. § 669–689 *b*.

[5] A common English form is here, "that he was baptized by the name of James, to wit, at the parish aforesaid, in the county aforesaid, and by the Christian name of James hath also since his baptism hitherto been called or known." Archb. Crim. Pl. & Ev. 13th ed. 112. While either method is legally good, that in the text will commonly be the more available with us. Crim. Proced. I. § 686.

[6] For precedents, see Archb. Crim. Pl. & Ev. 13th ed. 112; 4 Chit. Crim. Law, 520, 521; Rex *v.* Knowles, Trem. P. C. 11, 12; Rex *v.* Layer, 16 Howell St. Tr. 93, 114.

Alabama. — Lawrence *v.* The State, 59 Ala. 61.

New York. — Barnesciotta *v.* People, 10 Hun, 137.

Ohio. — Lasure *v.* The State, 19 Ohio State, 43.

Tennessee. — Lewis *v.* The State, 1 Head, 329.

§ 1038. **Grand Jury.**[1] — The plea in abatement that the grand jury was not legally competent, or that the indictment was not duly returned into court,[2] or, if admissible, was founded on illegal evidence,[3] will, except as to its formal parts, greatly vary with the special facts. And any attempt to set down words for unforeseen facts would be worse than useless. Even the formal parts are not quite uniform in the precedents, but there is nothing better for them than a substantial copying of the plea for misnomer just given. So that the averments may be, —

And the said A in his own proper person comes into court here, and, having heard the said indictment[4] read, says, that, &c. [setting out the defect according to the special fact and with a view to the law, which differs somewhat in our States; as], that X, one of the jurors of the grand jury by whom the said indictment was found and returned into court here, was not, when said grand jury was impanelled, or afterward, or when it found said indictment, or when it returned the same into court here, a freeholder or a housekeeper in said county of M,[5] and this the said A is ready to verify. Wherefore he prays judgment of the said indictment, and that the same may be quashed.[6]

[1] Crim. Proced. I. § 883–885.

[2] Ib. § 869 *a*; Long *v.* The State, 56 Ind. 133.

[3] Crim. Proced. I. § 872–874; The State *v.* Parrish, 8 Humph. 80; French *v.* People, 3 Parker C. C. 114, 117.

[4] In a part of the precedents, the expression is "*supposed* indictment." I should think this adjective desirable where the defect is of a sort rendering the indictment void. But where, as in most of the cases, it is only voidable, there would appear to be no particular propriety in its use. Doubtless, in point of law, the plea is equally good either way.

[5] The State *v.* Hawkins, 5 Eng. 71; Barney *v.* The State, 12 Sm. & M. 68, 71.

[6] For precedents, see Rex *v.* Leech, 9 Howell St. Tr. 351, 355; Reg. *v.* Duffy, 1 Cox C. C. 283; Reg. *v.* Duffy, 4 Cox C. C. 172.

Alabama. — The State *v.* Middleton, 5 Port. 484, 485, 486; Oliver *v.* The State, 66 Ala. 8.

Arkansas. — The State *v.* Hawkins, 5 Eng. 71.

Connecticut. — The State *v.* Hamlin, 47 Conn. 95.

Indiana. — Hardin *v.* The State, 22 Ind. 347; Kambieskey *v.* The State, 26 Ind. 225; Long *v.* The State, 56 Ind. 133; Meiers *v.* The State, 56 Ind. 336, 339; Sater *v.* The State, 56 Ind. 378.

Maine. — The State *v.* Ward, 64 Maine, 545, 546; The State *v.* Flemming, 66 Maine, 142; The State *v.* Hcselton, 67 Maine, 598.

Massachusetts. — Commonwealth *v.* Bannon, 97 Mass. 214; Commonwealth *v.* Moran, 130 Mass. 281.

Michigan. — Findley *v.* People, 1 Mich. 234.

Mississippi. — Barney *v.* The State, 12 Sm. & M. 68, 71; Baker *v.* The State, 23 Missis. 243.

Nebraska. — Barton *v.* The State, 12 Neb. 260.

New Mexico. — Carter *v.* Territory, 1 New Mex. 317.

New York. — People *v.* Moneghan, 1 Parker C. C. 570; French *v.* People, 3 Parker C. C. 114, 117; People *v.* Cyphers, 5 Parker C. C. 666, 670; Stokes *v.* People, 53 N. Y. 164; Dolan *v.* People, 64 N. Y. 485.

United States. — United States *v.* Hammond, 2 Woods, 197, 201.

§ 1039. **Other Pleas in Abatement,** — if required, can be readily framed after the model of the foregoing. Not often will there be occasion for others.[1]

IV. *Demurrers.*[2]

§ 1040. **Here and Elsewhere.** — Only demurrers to the indictment are for this place, those to pleas and the like are for the eighth sub-title.

§ 1041. **Form.** — There are verbal differences in the precedents; but it well accords with usage to say, after entitling the cause, —

And the said A [the defendant] in his own proper person comes into court here, and, having heard the said indictment read, says, that the said indictment and the matters therein are, as therein alleged and set forth, not sufficient in law to compel him the said A to answer thereto [if the demurrer is special, add here, for that, &c. stating the specific objections in detail], and this he the said A is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged of the said indictment.[3]

V. *Pleas in Bar.*[4]

§ 1042. **Former Conviction or Acquittal.**[5] — The only essential difference between the pleas of *autrefois convict* and *autrefois acquit* is, that the one has the word "convicted" where the other has "acquitted;" though, among some of the precedents, other

[1] **Wrong Addition, or none.** — In not many of our States, if in any, is this a ground of abatement. Ante, § 74. For forms of the plea, see 4 Chit. Crim. Law, 520, 522, 524; 2 Stark. Crim. Pl. 2d ed. 784, 785; Rex *v.* Grainger, 3 Bur. 1617.

Another Indictment Pending. — This is not commonly ground for abatement. Crim. Law, I. § 1014. Still, for forms of the plea, see Rex *v.* Nosworthy, Trem. P. C. 75; Reg. *v.* Mitchel, 3 Cox C. C. 93, 106; Austin *v.* The State, 12 Misso. 393.

[2] Crim. Proced. I. § 775–786. Incidental, Crim. Law, I. § 1027; Crim. Proced. I. § 424, 442, 730, 730 *a*, 741, 746, 793, 1286.

[3] For precedents, see Archb. Crim. Pl. & Ev. 19th ed. 138; 4 Chit. Crim. Law, 517–519; 6 Went. Pl. 408; Rex *v.* Johnson, Trem. P. C. 119, 123; Rex *v.* A. B. Trem. P. C. 269, 270.

Alabama. — Perkins *v.* The State, 50 Ala. 154; Cheatham *v.* The State, 59 Ala. 40.

Iowa. — The State *v.* Baumon, 52 Iowa, 68.

Nevada. — The State *v.* Harris, 12 Nev. 414, 417.

New York. — People *v.* Gilkinson, 4 Parker C. C. 26, 28; People *v.* Fish, 4 Parker C. C. 206, Sheldon, 537, 538.

Ohio. — The State *v.* Barker, 28 Ohio State, 583.

[4] Crim. Proced. I. § 742, 745–756, 805–848; II. § 1049; Stat. Crimes, § 264.

[5] Crim. Proced. I. § 808–817.

slight differences, of no legal consequence, may be discovered. Considering that this is a favored plea, wherein the lowest sort of certainty will suffice,[1] it is remarkable as having been constructed to embrace much more of minute allegation than, at first impression, any just view of the principles involved would seem to require.[2] Still, as the common-law forms are not quite without support in reason, and as briefer methods are widely provided for by legislation, it will not be advisable to attempt here any amendment in what of the old appears to be established. So that —

§ 1043. **Common-law Plea.** — The plea, after being entitled, may proceed, —

And the said A in his own proper person comes into court here, and, having heard the said indictment read, says, that the said Commonwealth [*or* State, *or* People, *or* United States] ought not further to prosecute the same against him; because he says, that heretofore at a court of, &c. [enlarging the allegations here until they cover the entire matter of the caption of the former indictment], it was [not "is," but employing here and throughout the past tense where the record[3] has the present[4]] by the oath [*or* oath and affirmation] of the jurors of the said Commonwealth [*or*, State, *or*, &c. as before][5] presented, that the said A, by the name and description of, &c. [giving the name and addition precisely as they stand in the indictment being copied], on, &c. at, &c. [proceeding with verbal accuracy to the very end of such indictment], to which last-mentioned indictment the said A pleaded not guilty and the said Commonwealth [*or*, &c.] joined issue on said plea; and a jury, thereupon duly summoned, impanelled, and sworn to try said issue, upon their oath did say that the said A was guilty [*or* not guilty] of the felony [*or* treason, *or* misdemeanor, *or* offence] in the said last-mentioned indictment laid to his charge [*or*, if the plea was guilty, this finding of the jury will be omitted], whereupon it was by the said last-mentioned court considered that, &c. [setting out the sentence[6] of conviction, or of acquittal and discharge],[7] as by the record thereof more fully and at large appears [which judgment still remains in

[1] Ih. § 745, 808.

[2] See the elucidations in the chapter, ante, § 91–97; where, however, some justification of the established methods in these pleas is attempted.

[3] Crim. Proced. I. § 1349.

[4] Compare with ante, § 94.

[5] Ante, § 57, and see § 53–64. These several allegations should conform to the record, so they will not always stand precisely as in the text.

[6] Or, as to how much, see Crim. Proced. I. § 815.

[7] We may find in the books passages indicating that the record, from the indictment down to this place, should be fully set out. But the reason (ante, § 93–95) which requires the indictment to appear fully in exact words does not apply to the remaining part of the record. Nor do the precedents in general set out such record thus fully. I am quite sure there ought not to be any difference of opinion as to the sufficiency of these allegations in the text. Many precedents accepted as good have less. See, for example, Reg. *v.* Austin, 2 Cox C. C. 59.

full force and effect, and not in the least reversed or made void[1]]. And the said A avers, that he and the A [*or* B] who was the defendant in the indictment recited in this plea and convicted [*or* acquitted] as aforesaid are one and the same person, and not divers and different persons; and that the offence in the said last-mentioned indictment set out and the one charged in the indictment to which this plea is pleaded are one and the same offence, and not divers and different offences [*adding*, also, in such special circumstances as may seem to require, other averments of identity, according to the particular facts]. All of which the said A is ready to verify;[2] wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the premises in the present indictment specified and contained. [Here the plea ends. But opinions differ as to whether or not the plea of not guilty should be added.[3] If it is added, the form proceeds]: And as to the felony and larceny[4] [*or* felony, *or* misdemeanor, *or* offence] of which the said A stands here indicted, he says that he is not guilty thereof, and of this he puts himself upon the country.[5]

[1] The matter in these brackets is not in all the precedents; it is not essential to a *prima facie* case, therefore it is unnecessary. If the plea were in abatement, and so requiring a possible answer to be anticipated and overthrown, it would be different.

[2] In Reg. *v.* Austin, 2 Cox C. C. 59, 60, Pratt, B. said: "You should have concluded with a verification, for your plea introduces new matter. But the court will give you permission to amend, as it is only an informality."

[3] Crim. Proced. I. § 811, 812.

[4] Reg. *v.* Green, Dears. & B. 113, 114; Reg. *v.* Austin, 2 Cox C. C. 59, 60.

[5] I have not found any one precedent which in every respect answered the requirements of my text. So this form is in some degree constructed on a comparison of precedents. And see, for forms and precedents, at common law and under statutes, not only for this plea, but also for the proceedings and pleas where there has been a jeopardy in a cause which did not progress to a conviction or acquittal, but which was still supposed to entitle the defendant to his discharge from the second or same indictment, Archb. Crim. Pl. & Ev. 10th ed. 89, 91; 4 Chit. Crim. Law, 528–539, 567; Rex *v.* Essex, Trem. P. C. 205, 206; Rex *v.* Clark, 1 Brod. & B. 473; Rex *v.* Emden, 9 East, 437; Rex *v.* Taylor, 3 B. & C. 502; Reg. *v.* Charlesworth, 1 B. & S. 460, 463, 9 Cox C. C. 40; Winsor *v.* Reg. Law Rep. 1 Q. B. 289; Rex *v.* Vandercomb, 2 Leach, 4th ed. 708; Rex *v.* Dann, 1 Moody, 424; Reg. *v.* Bird, 2 Den. C. C. 94, 224; Reg. *v.* Green, Dears. & B. 113, 7 Cox C. C. 186; Rex *v.* Sheen, 2 Car. & P. 634, 635; Reg. *v.* Walker, 2 Moody & R. 446; Reg. *v.* Davison, 2 Fost. & F. 250; Reg. *v.* Austin, 2 Cox C. C. 59; Reg. *v.* Mitchel, 3 Cox C. C. 93; Reg. *v.* Bird, 5 Cox C. C. 11; Reg. *v.* Connell, 6 Cox C. C. 178; Reg. *v.* Davison, 8 Cox C. C. 360; Reg. *v.* Elrington, 9 Cox C. C. 86; Reg. *v.* Westley, 11 Cox C. C. 139, 140; Reg. *v.* Tancock, 13 Cox C. C. 217; Rex *v.* Foy, Vern. & S. 540.

Alabama. — The State *v.* Standifer, 5 Port. 523; McCauley *v.* The State, 26 Ala. 135; Barrett *v.* The State, 35 Ala. 406, 408; Lyman *v.* The State, 45 Ala. 72, 74; Lyman *v.* The State, 47 Ala. 686; White *v.* The State, 49 Ala. 344.

Arkansas. — Rector *v.* The State, 1 Eng. 187; Atkins *v.* The State, 16 Ark. 568; Wilson *v.* The State, 16 Ark. 601; The State *v.* McMinn, 34 Ark. 160, 161.

Connecticut. — The State *v.* Allen, 46 Conn. 531.

Indiana. — The State *v.* Wilson, 50 Ind. 487; The State *v.* Morgan, 62 Ind. 35, 37; Bryant *v.* The State, 72 Ind. 400.

Massachusetts. — Commonwealth *v.* Cunningham, 13 Mass. 245; Commonwealth *v.* Curtis, 11 Pick. 134; Commonwealth *v.* Roby, 12 Pick. 496; Commonwealth *v.* Peters, 12 Met. 387; Commonwealth *v.* Harris, 8 Gray, 470; Commonwealth *v.* Bakeman, 105 Mass. 53; Commonwealth *v.* Farrell, 105 Mass. 189; Com-

§ 1044. **Former Jeopardy without Conviction or Acquittal.**[1] — Minute directions for the various steps under this head are given in "Criminal Procedure." And the references in the notes to the last section include those to the forms under this. But these forms are not, in general, particularly well constructed, while yet a revision of them for this place seems not to be called for. The plea in the nature of a former acquittal may be framed from that in the last section, by simply varying it to conform to the different facts.[2] The other forms, demanded by the varying exigencies of cases, will be obvious.

monwealth *v.* Bosworth, 113 Mass. 200; Commonwealth *v.* Bressant, 126 Mass. 246.

New York. — Grant *v.* People, 4 Parker C. C. 527, 529; People *v.* Van Keuren, 5 Parker C. C. 66; People *v.* Cramer, 5 Parker C. C. 171; Gardiner *v.* People, 6 Parker C. C. 155; Canter *v.* People, 1 Abb. Ap. 305, 306.

Pennsylvania. — Commonwealth *v.* Clue, 3 Rawle, 498; McCreary *v.* Commonwealth, 5 Casey, Pa. 323.

Tennessee. — Hite *v.* The State, 9 Yerg. 357, 359; McGinnis *v.* The State, 9 Humph. 43; Mikels *v.* The State, 3 Heisk. 321

Texas. — Pritchford *v.* The State, 2 Texas Ap. 69.

Vermont. — The State *v.* Damon, 2 Tyler, 387.

Virginia. — Commonwealth *v.* Myers, 1 Va. Cas. 188, 3 Wheeler Crim. Cas. 545; Robinson *v.* Commonwealth, 32 Grat. 866.

[1] Crim. Proced. I. § 818–831.

[2] In Robinson *v.* Commonwealth, 32 Grat. 866, the following, which does not fulfil the common-law requirements as generally accepted, was treated as good: —

And the said A comes and says that no further proceedings in the premises should be had or taken against her on the said indictment, because she says that on, &c. in the hustings or corporation court of the city of M, she the said defendant was put upon her trial upon an indictment for the identical charge contained in this a second indictment for the same offence, and a jury between the Commonwealth and the said defendant, upon the said indictment, on, &c. was in due form of law drawn, selected, and impanelled, charged and sworn to well and truly try the said issue. And the said jury, without the consent of the said A, have been discharged and separated without having rendered any verdict therein, and without disagreeing or other special cause, there being no material necessity for the discharge of the said jury; and the said A says, that she has been once in jeopardy upon and for the said charge and offence for which she now stands charged and indicted in the present indictment, to which she is now called on to plead, and cannot by the law of the land be again tried therefor; and this she is ready to verify. [If the pleader ventures to follow this form he will add here], Wherefore she prays judgment, and that by the court here she may be discharged and dismissed from the premises in the present indictment contained.

In Grant *v.* People, 4 Parker C. C. 527, 529, a former discharge of the jury unauthorized, *on the same indictment* (see Crim. Proced. I. § 821–826), was without objection set up by plea as follows: —

And the said A comes and says, that no further proceedings in the premises ought to be had or taken against him on the said indictment, because he says, that on, &c. in the Court of Sessions in the said county, the said defendant was put upon his trial upon said indictment, and a jury between the people and the said defendant, upon the said indictment, was in due form of law drawn, impanelled, charged, and sworn to well and truly try the said issue. And the said jury, without the consent of the said defendant, have been discharged and separated without having rendered any verdict therein, and without disagreeing or other special cause, but by mere irregularity; and the said defendant says, that he has been once in jeopardy upon the said indictment, and cannot by the law of the land be again tried thereon.

And see, for forms similar to these two, The State *v.* Wilson, 50 Ind. 487; Mc-

§ 1045. **Pardon.**[1] — The plea of pardon, not often called for in practice, may be drawn from the directions in "Criminal Procedure;" or the pleader may consult the precedents referred to in the note.[2]

§ 1046. **Others.** — There are other pleas in bar familiar to the English practice.[3] But it is doubtful whether in this country there are any defences besides the foregoing not permissible under the general issue. And in reason, on a question not much discussed in the books, the rule familiar in civil causes that what amounts to the general issue is not pleadable specially[4] should be applied equally to criminal.[5]

Creary *v.* Commonwealth, 5 Casey, Pa. 323; Commonwealth *v.* Farrell, 105 Mass. 189; Lyman *v.* The State, 47 Ala. 686; White *v.* The State, 49 Ala. 344; Lyman *v.* The State, 45 Ala. 72, 74; Barrett *v.* The State, 35 Ala. 406; McCauley *v.* The State, 26 Ala. 135; Reg. *v.* Davison, 8 Cox C. C. 360; Conway *v.* Reg. 1 Cox C. C. 210.

[1] Crim. Proced. I. § 832–848.

[2] For the plea of the executive pardon, 4 Chit. Crim. Law, 452; Rex *v.* Hambden, Trem. P. C. 307, 311; Rex *v.* Danby, 11 Howell St. Tr. 599, 764; Bull *v.* Tilt, 1 B. & P. 198 (not good); Michael *v.* The State, 40 Ala. 361 (amnesty and pardon). Statutory pardon, Reg. *v.* Arundell, Trem. P. C. 271, 272; 4 Chit. Crim. Law, 452. Judgment in cases of pardon, Ib. 453, 454. Forms of executive pardon, United States *v.* Wilson, 7 Pet. 150, 153; The State *v.* Foley, 15 Nev. 64.

[3] **Way.** — Among the more familiar are special pleas to the indictment for non-repair of public ways, casting the duty on another party, and the like. But it is explained elsewhere that probably none of these pleas are necessary with us. Crim. Proced. II. § 1049. See, for precedents, 4 Chit. Crim. Law, 541–567; 4 Went. Pl. 161–191; 6 Ib. 394, 410, 414; Rex *v.* Kent, 2 M. & S. 513; Rex *v.* Eastrington, 5 A. & E. 765; Reg. *v.* Barnoldswick, 4 Q. B. 499; Reg. *v.* Ely, 15 Q. B. 827, 4 Cox C. C. 281, 282; Reg. *v.* Ashby Folville, 10 Cox C. C. 269.

[4] Steph. Pl. 418, 419.

[5] Instances wherein, other than as stated in a previous note, special pleas in bar have been employed are —

Legislative Authorization of Nuisance. — Persons indicted for a public nuisance defended by a special plea, adjudged good, as follows: —

And the said A [to avoid repetition, I shall omit the other names and assume that A was indicted alone] in his own proper person comes into court here, and, having heard the said indictment read, says, that the said Commonwealth ought not further to prosecute the said indictment against him; because he says, that the pond and reservoir complained of in said indictment are a part of the internal improvements of this Commonwealth, called the, &c. [canal], and are and were constructed by said Commonwealth in order that the same be and remain a public highway, for the passage at all times of all persons with horses, boats, and merchandise, on the said [canal]; that the said dams and damming the southern end of the M swamp, in the said indictment mentioned, were created, constructed, and erected by the authority and in pursuance of laws of this Commonwealth, by the officers, engineers, and agents thereof, lawfully created, appointed, and employed therefor, for the purpose of securing and furnishing sufficient water for the supply of the said [canal]; that the said A is in the possession of the said pond, reservoir, and dam by authority and in pursuance of the Act of Assembly, entitled, &c. as director of said company, and not otherwise; and by the terms, conditions, and provisions of said act of incorporation he is required and commanded to keep up said dam and damming pond and reservoir for the purposes of said canal as aforesaid, in order that the said canal shall form, be, and remain a public highway, for the passage at all times of all persons with horses, boats, and merchandise, and for the protection of the interest and property of the said Commonwealth retained and reserved therein by

§ 1047. **As to which.** — If, in any case not contemplated in the foregoing sections, a special plea in bar is deemed to be the proper method of defence, counsel can readily construct it on the models already given.

VI. *The General Issue.*[1]

§ 1048. **Elsewhere.** — The form of the plea of not guilty is explained in "Criminal Procedure."[2]

§ 1049. **By Attorney.** — When it is pleaded by attorney, as in exceptional cases of misdemeanor it may be,[3] the form is, —

And the said A comes into court here by X his attorney,[4] and, having heard the said indictment read, says, that he is not guilty of the misde-

the said Commonwealth under the terms and conditions of said act of incorporation; and further, that he has no right or power, under the laws of said Commonwealth, to renew the same, but only to keep the same in repair. And this the said A is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified. Commonwealth *v.* Reed, 10 Casey, Pa. 275, 276.

Now, it is perceived that the matter of this plea is simply an argumentative denial that the defendants are or ever were guilty; hence, in principle, not only was it unnecessary, but it should have been rejected by the court. Crim. Proced. I. § 799. It is otherwise with the plea of the —

Statute of Limitations. — As this plea does not deny the original guilt charged, defendants are permitted to plead it; though they need not, for they may avail themselves of the defence under the general issue. Crim. Proced. as above; Stat. Crimes, § 264. The allegations, by one who chooses this method of defence, should conform to the statutory terms and special facts; as, for example, they were in one case, People *v.* Roe, 5 Parker C. C. 231, —

And the said A in his own proper person comes into court here, and, having heard the said indictment read, by leave of the court also first had and obtained, says, that the said People of the said State ought not further to prosecute the said indictment against him the said A, because he says the said indictment was found and filed on the, &c. [stating the date], and that the said indictment was not found or filed in the proper or in any court within three years after the commission of the offence in the said indictment specified, although during the whole time since the commission of the said offence he has been and now is an inhabitant of and usually resident within the United States. And this he the said A is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

Refusing Office. — There are English precedents for pleading specially in bar an excuse for refusing office. Rex *v.* King, Trem. P. C. 217, 218; Rex *v.* Caslin, Trem. P. C. 219, 220. But they are old, and modern usage is believed not to accord with them.

Some further illustrations of what has been, in various circumstances, attempted or permitted may be seen in the following: Rex *v.* Lovelace, Trem. P. C. 273, 275; Rex *v.* A. B. Trem. P. C. 269; Reg. *v.* Newman, Dears. 85, 1 Ellis & B. 558, 3 Car. & K. 85; The State *v.* Chapin, 17 Ark. 561; Hardin *v.* The State, 12 Texas Ap. 186; United States *v.* Kindred, 4 Hughes, 493, 495. Whether in any or all these cases the special plea was properly admissible we need not further inquire. The principle governing the question already appears.

[1] Crim. Proced. I. § 794 *a*-801.

[2] Ib. § 795.

[3] Crim. Proced. I. § 268, 733.

[4] The written plea in person differs from this only in omitting the words "by X his attorney."

meanor [*or* offence] therein charged against him, and hereof he puts himself upon the country.[1]

§ 1050. **Oral — Entered by Court.** — The oral plea of not guilty is less formal.[2] So undoubtedly no one exclusive form is required for the plea which in special circumstances the court orders to be entered of record under the authority of a statute.[3] Still as this is a proceeding unknown to the common law, the statutory formalities must be fully complied with;[4] but, in mere form of words, there will be nothing not obvious.

VII. *The Plea of Nolo Contendere.*[5]

§ 1051. **How the Form.** — The extended form of this plea is not much shown by precedents. It is granted only at the discretion of the court on special application; judgment under it is, for all purposes, a conviction;[6] and it differs in its effect from the plea of guilty, simply in that it cannot as a confession be brought in evidence against the defendant in another proceeding. Yet because it is an implied confession as to the particular case,[7] evidently it does not open with a protestation of innocence, nor could the court accept it in such form; since to convict without proof one protesting his innocence would be a prostitution of public justice however he might consent. Still the author has seen nothing conclusive directly to this point in any book of authority.[8] We are simply informed, that, when the court accepts this plea, "an entry is made to this effect, that the defendant *non vult contendere cum domina regina et posuit se in gratiam curiæ*."[9] Hence —

[1] Essentially following 4 Chit. Crim. Law, 499; Archb. Crim. Pl. & Ev. 19th ed. 150. For other precedents, see 4 Chit. Crim. Law, 540, 541; 4 Went. Pl. 44; Rex *v.* Pilkington, Trem. P. C. 182, 184.

[2] Archb. Crim. Pl. & Ev. 149, 150; Crim. Proced. I. § 733 *b*, 796.

[3] Crim. Proced. I. § 733 *a*.

[4] Stat. Crimes, § 119.

[5] Crim. Proced. I. § 802–804.

[6] United States *v.* Hartwell, 3 Clif. 221, 232; and cases infra.

[7] Reg. *v.* Templeman, 1 Salk. 55; Commonwealth *v.* Horton, 9 Pick. 206; Commonwealth *v.* Tilton, 8 Met. 232, 233.

[8] In Commonwealth *v.* Horton, supra, a learned judge casually observed: "The plea of *nolo contendere*, pleaded with a protestation that the party was not guilty, would clearly not conclude the party in his defence against the civil action." p. 208. But our books of reports are full of observations which might be tortured into all sorts of meanings antagonistic to sound doctrine. Nothing is more familiar than that the evidence they afford of the law is very slight. In this very case, the plea before the court did not contain the protestation of innocence, and there was no intimation that it was defective.

[9] 1 Chit. Crim. Law, 431; Reg. *v.* Templeman, supra; Rex *v.* Williams, Comb. 18, 19.

§ 1052. **Form.** — We may deem something like the following the proper form for the extended plea: —

And the said A in his own proper person comes into court here, and, having heard the said indictment read, says, by permission of the court here, that he will not contend with the said Commonwealth [*or*, State, *or*, &c.], and hereof he puts himself upon the clemency of the court.[1]

VIII. *Pleadings subsequent to the Pleas.*

§ 1053. **Demurrer to Plea.** — The form may be, —

And X [the prosecuting officer, add his title, which differs in our States] who prosecutes for the said Commonwealth [*or* State, *or*, &c.[2]] in this behalf, as to the said plea of the said A by him above pleaded, says, that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said Commonwealth [*or* State, *or*, &c.] from prosecuting the said indictment against him the said A, and the said Commonwealth [*or*, &c.] is not bound by law to answer the same; and this the said X, who prosecutes as aforesaid, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, he the said X for the said Commonwealth [*or*, &c.] prays judgment, and [where the case justifies] that the said A may be convicted of the premises therein specified [*or*, in other cases, that the said indictment may be adjudged good, and the said A may further answer thereto].[3]

§ 1054. **Joinder in Demurrer to Indictment.** — The form may be, —

And X [adding his official title], who prosecutes for the said Commonwealth [*or* State, *or*, &c.] in this behalf, says, that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said A to answer to the same; and this the said X who prosecutes as aforesaid is ready to verify, and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said A has not answered to the said indictment, or hitherto in any manner denied the same, the said X for the said

[1] The form under consideration in Commonwealth *v.* Horton, supra, was, as appearing in the record: "And now the said A is set to the bar, and has this indictment read to him; he says he will not contend with the Commonwealth, with which the attorney for the Commonwealth is content. It is therefore considered," &c.

[2] See ante, § 58.

[3] For forms, see Archb. Crim. Pl. & Ev. 19th ed. 138, 139; 4 Chit. Crim. Law, 507, 515, 525, 529, 532, 571, 572; Rex *v.* Devonshire, Trem. P. C. 188, 189; Rex *v.* Essex, Trem. P. C. 205, 207; Rex *v.* Read, Trem. P. C. 559, 568; Rex *v.* Layer, 16 Howell St. Tr. 93, 115; Rex *v.* Kinloch, Foster, 16, 19; Rex *v.* Vandercomb, 2 Leach, 4th ed. 708, 715; French *v.* People, 3 Parker C. C. 114, 120; Gardiner *v.* People, 6 Parker C. C. 155, 159.

Commonwealth [*or*, &c.] prays judgment, and that the said A may be convicted of the premises in the said indictment specified.[1]

§ 1055. **Joinder in Demurrer to Plea.** — The form may be, —

And the said A says, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said Commonwealth [*or* State, *or*, &c.] from prosecuting the said indictment against him the said A; and the said A is ready to verify and prove the same as the said court here shall direct and award. Wherefore, inasmuch as the said X for the said Commonwealth [*or*, &c.] hath not answered the said plea, or hitherto in any manner denied the same, the said A prays judgment, and that [the said indictment may be quashed,[2] and] by the court here he may be dismissed and discharged from the premises in the said indictment specified.[3]

§ 1056. **Replication to Plea to Jurisdiction.** — The form may be, —

And hereupon X [the prosecuting officer, adding the title of his office], who prosecutes for the said Commonwealth [*or* State, *or*, &c.] in this behalf, says, that notwithstanding anything by the said A above in pleading alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid; because he says, that, &c. [setting out the matter relied on, and, if it is new matter, ante, § 1043, note, adding the verification; if not, the conclusion to the country; thus], and this he the said X for the said Commonwealth [*or*, &c.] is ready to verify [*or*, prays may be inquired of by the country]. Wherefore he prays judgment, and that the said A may answer to the said indictment.[4]

§ 1057. **Replication to Plea in Abatement — (Misnomer).** — To the plea of misnomer the replication may be, and under the facts of most of the cases is, —

[1] All the precedents that I have observed conclude with this form of prayer. And where, as formerly in all cases, and still in misdemeanors and to a considerable extent in felonies, the defendant is not entitled as of right to answer over (Crim. Proced. I. § 782–786), it is unquestionably correct. But where the defendant may as of right answer over, the prayer in principle should be "that the said indictment may be adjudged good, and the said A may further answer thereto." For forms, see Archb. Crim. Pl. & Ev. 19th ed. 138; Archb. New Crim. Proced. 116; 4 Chit. Crim. Law, 517 *a*, 518; 6 Went. Pl. 409; Rex *v.* Johnson, Trem. P. C. 119, 123; People *v.* Weston, 4 Parker C. C. 226.

[2] The matter in these brackets to be omitted where the plea was in bar.

[3] For precedents, see Archb. Crim. Pl. & Ev. 19th ed. 139; Archb. New Crim. Proced. 117; 4 Chit. Crim. Law, 515, 526, 530, 571; Rex *v.* Devonshire, Trem. P. C. 188, 189; Rex *v.* Vandercomb, 2 Leach, 4th ed. 708; French *v.* People, 3 Parker C. C. 114, 121; Gardiner *v.* People, 6 Parker C. C. 155, 160.

[4] For precedents, see Archb. Crim. Pl. & Ev. 10th ed. 81, 19th ed. 135; 4 Chit. Crim. Law, 514; Sam *v.* The State, 31 Missis. 480.

And hereupon X, &c. [as in the last form], says, that the said indictment, by reason of anything by the said B [the name which the defendant claims in his plea] in his said plea above alleged, ought not to be quashed; because he says, that the said B, long before and at the time of the preferring of the said indictment, was and still is known as well by the name of A [the name which the indictment gives him] as by the name of B [to wit, at the parish aforesaid, in the county aforesaid [1]]; and this he prays may be inquired of by the country.[2]

§ 1058. **Same — (Incompetency of Grand Juror).** — In one case, a replication in the following form was not objected to: —

And hereupon X [adding the official title of the prosecuting officer], who prosecutes for the Commonwealth in this behalf, says, that notwithstanding anything by the said A in pleading alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid; because he says, that the grand jurors from the towns of N and O, to wit, Y and Z, as to whom specific objection is taken in said defendant's plea, were duly and legally drawn, summoned, notified, and returned as grand jurors, and presented themselves on the first day of the term of this court at the April term thereof in the present year, and were then duly sworn and impanelled, and that the said grand jury was in all respects a legal grand jury; and this the said X is ready to verify. Wherefore he prays judgment, and that the said A may answer to this said indictment.[3]

§ 1059. **Replication to Plea in Bar.** — The formal parts, the filling up whereof will considerably vary with differing facts, may be, —

And hereupon X [the prosecuting officer, adding his official title], who prosecutes for the said Commonwealth [*or* State, *or*, &c.] in this behalf, says, that by reason of anything alleged in the said plea of the said A above pleaded in bar, the said Commonwealth [*or*, &c.] ought not to be precluded from prosecuting the said indictment against the said A; because he says, that, &c. [here setting out the matter special to the case], and this the said X for said Commonwealth [*or*, &c.] is ready to verify [*or*, prays may be inquired of by the country [4]]. Wherefore he prays judgment, and that the said A may be convicted of the premises in the said indictment specified.[5]

[1] The matter in these brackets is in the form before me, but I can discover no principle requiring it. The *place* at which the name was borne by the defendant is not, like that at which he committed the offence, an element in the jurisdiction.

[2] Archb. Crim. Pl. & Ev. 10th ed. 82. And compare with 4 Chit. Crim. Law, 526; Rex *v.* Knowles, Trem. P. C. 11, 13.

[3] Commonwealth *v.* Moran, 130 Mass. 281, 282. For another form, see The State *v.* Hawkins, 5 Eng. 71.

[4] Explained, ante, § 1056.

[5] As to the form of the prayer, see the note to ante, § 1054. For precedents, see Archb. Crim. Pl. & Ev. 10th ed. 86, 19th ed. 140; 4 Chit. Crim. Law, 549, 556, 559, 562, 569; 4 Went. Pl. 174; 6 Ib. 412,

§ 1060. **Still later Pleadings.** — The pleadings are occasionally continued further; but the foregoing, supplemented in proper cases by the familiar "And the, &c. does the like," ordinarily suffice to develop the issue. The forms already given in this chapter will serve as models for such further ones as may be required.[1]

IX. *Setting up Insanity in Defence.*[2]

§ 1061. **Elsewhere.** — The steps, where the insanity of a prisoner is suggested, are sufficiently stated in "Criminal Procedure."

§ 1062. **Oath to Jury.** — The oath to a jury impanelled to try whether the prisoner is so insane as to be incapable of making his defence, is, —

You shall diligently inquire and true presentment make [*or*, a true verdict return] for and on behalf of the Commonwealth [*or* State, &c.], whether A, the prisoner at the bar, who now stands indicted for murder [*or* rape, *or*, &c. according to the fact] be of sound mind and understanding or not, and a true verdict give according to the best of your understanding, so help you God.[3]

§ 1063. **Record.** — There should be a record of the fact of the inquiry and finding. And, as such fact will vary in its particulars with the cases, so will the record of it.[4]

416; Reg. *v.* Ashby Folville, 10 Cox C. C. 269, 270. To plea of **Former Conviction, Acquittal, or Jeopardy.** — The replications to this class of pleas are varied. It will suffice simply to refer to places where precedents may be found. Archb. Crim. Pl. & Ev. 10th ed. 90, 92, 19th ed. 144, 147; Archb. New Crim. Proced. 112; 4 Chit. Crim. Law, 538; Reg. *v.* Davison, 2 Fost. & F. 250, 8 Cox C. C. 360; Conway *v.* Reg. 1 Cox C. C. 210; Reg. *v.* Bird, 5 Cox C. C. 11; Reg. *v.* Connell, 6 Cox C. C. 178; Rocco *v.* The State, 37 Missis. 357; Grant *v.* People, 4 Parker C. C. 527, 529; People *v.* Cramer, 5 Parker C. C. 171.

[1] See, for demurrer to replication, 4 Chit. Crim. Law, 526. Joinder in demurrer to replication, 4 Chit. Crim. Law, 527; Rex *v.* Knowles, Trem. P. C. 11, 14. Rejoinder, 4 Chit. Crim. Law, 452; Rex *v.* Edwards, Trem. P. C. 192, 194. Snrrejoinder, Rex *v.* Amery, Trem. P. C. last page.

[2] For the direct expositions of the law of this defence, with the procedure, see Crim. Law, I. § 374–396; Crim. Proced. II. § 664–687 *b*. Incidental, Crim. Law, I. § 261, 406, 407, 651; II. § 1121, 1123, 1124; Crim. Proced. I. § 522, 925, 950 *c*, 1141; Stat. Crimes, § 131.

[3] Rex *v.* Frith, 22 Howell St. Tr. 307, 311; People *v.* Kleim, 1 Edm. Sel. Cas. 13, 15; Commonwealth *v.* Hathaway, 13 Mass. 299. The oath in the case last cited had the words "according to your evidence and knowledge." I see no reason to suppose that any one form of words is indispensable. And compare with Rex *v.* Pritchard, 7 Car. & P. 303.

[4] For a form, see Archb. Crim. Pl. & Ev. 19th ed. 153.

X. *The Change of Venue.*[1]

§ 1064. **Differences — Forms.** — The practice on this subject is statutory, and it differs greatly in our respective States. Therefore it will be judicious here simply to refer to places where forms may be found.[2]

XI. *The Application for Continuance.*[3]

§ 1065. **How the Forms.** — While the forms for this proceeding are, in the main, substantially the same in our different States, they are simple, and are attended with no difficulties not explained in the other volumes of this series. It will, therefore, suffice simply to refer to places where they may be found.[4]

[1] For the direct exposition of this proceeding, see Crim. Proced. I. § 68–76. Incidental, Crim. Law, I. § 995; Crim. Proced. I. § 50, 106, 1023 *a*, 1355; Stat. Crimes, § 112, 144, 198, 306, 587, 588, 599.

[2] 4 Chit. Crim. Law, 298.

Alabama. — Taylor *v.* The State, 48 Ala. 180, 182. And see Childs *v.* The State, 55 Ala. 25; Goodloe *v.* The State, 60 Ala. 93.

California. — People *v.* Mahoney, 18 Cal. 180.

Florida. — Irvin *v.* The State, 19 Fla. 872, 873.

Illinois. — Barrows *v.* People, 11 Ill. 121; Rafferty *v.* People, 66 Ill. 118, 119.

Indiana. — Gordon *v.* The State, 59 Ind. 75.

Iowa. — The State *v.* Clarke, 46 Iowa, 155; The State *v.* Canada, 48 Iowa, 448.

Missouri. — The State *v.* Wetherford, 25 Misso. 439.

North Carolina. — The State *v.* Hill, 72 N. C. 345.

Texas. — Harrison *v.* The State, 3 Texas Ap. 558, 560. And see Webb *v.* The State, 9 Texas Ap. 490, 504.

[3] For the direct expositions of this proceeding, see Crim. Proced. I. § 951–951 *c*. Incidental, Ib. § 269, 730, 870 *a*, 1023 *a*.

[4] 4 Chit. Crim. Law, 293–296; Rex *v.* Heath, 18 Howell St. Tr. 1. And see Reg. *v.* Burke, 10 Cox C. C. 519, 520.

Illinois. — Moody *v.* People, 20 Ill. 315; Richardson *v.* People, 31 Ill. 170; Steele *v.* People, 45 Ill. 152; Wilhelm *v.* People, 72 Ill. 468.

Indiana. — Gross *v.* The State, 2 Ind. 135; Binns *v.* The State, 38 Ind. 277.

Iowa. — The State *v.* Painter, 40 Iowa, 298.

Michigan. — People *v.* Vanderpool, 1 Mich. N. P. 73; The State *v.* Maguire, 69 Misso. 197, 198.

New York. — People *v.* Baker, 3 Abb. Pr. 42, 43.

Texas. — Bruton *v.* The State, 21 Texas, 337; Shanks *v.* The State, 25 Texas Supp. 326; Dinkens *v.* The State, 42 Texas, 250; Austin *v.* The State, 42 Texas, 345, 346; Perkins *v.* The State, 1 Texas Ap. 114; Murry *v.* The State, 1 Texas Ap. 174.

CHAPTER XCV.

THE RECORD.[1]

§ 1066. **Elsewhere — Here.** — In various other places in the volumes of this series, the manner whereby the materials out of which the record is constructed, consisting of the files of the court, the minutes of its orders and doings, and other docket entries, is stated. We are here to consider, in distinction from these, the form of the final act of the court; namely, the record.

§ 1067. **Differences.** — On this subject, there are differences in the practice and forms in our several States.[2] Therefore the reader will find it particularly convenient to have before him, in the order of the States, some —

§ 1068. **References to Records.** — Not in every instance, in the places cited in the note, is the record complete. What the books furnish is here given.[3]

[1] For the direct expositions of the record, see Crim. Proced. I. § 1340–1360. Incidental, Crim. Law, I. § 468; II. § 531, 570, 596, 768, 785; Crim. Proced. I. § 4, 5, 125, 340–342, 364, 722–725, 815, 816, 825, 826, 840, 858, 869 *a*, 885, 888, 1133, 1282, 1285, 1368, 1398–1400; II. § 911; Stat. Crimes, § 29, 37.

[2] Crim. Proced. I. § 1341, 1360.

[3] 4 Chit. Crim. Law, 377–414, 432–442; 4 Went. Pl. 41–44, 148–152, 222; 6 Ib. 1; Rex *v.* Boucher, Trem. P. C. 150, 151; Rex *v.* Saxon, Trem. P. C. 157; Rex *v.* Pilkington, Trem. P. C. 182; Rex *v.* Fanshaw, Trem. P. C. 199; Rex *v.* Stone, Trem. P. C. 288; Rex *v.* Holles, Trem. P. C. 294; Burgess *v.* Coney, Trem. P. C. 315, 316; Rex *v.* Lancaster, 1 Howell St. Tr. 39 (reversing a judgment of treason); Rex *v.* Mohun, 12 Howell St. Tr. 950, 956; Reg. *v.* Hathaway, 14 Howell St. Tr. 690; Sanchar's Case, 9 Co. 114 *a*; Rex *v.* Dowlin, 5 T. R. 311; Campbell *v.* Reg. 11 Q. B. 799, 800, 1 Cox C. C. 269, 2 Cox C. C. 463; Wright *v.* Reg. 14 Q. B. 148; Gregory *v.* Reg. 15 Q. B. 957; Rex *v.* Baldwin, 2 Leach, 4th ed. 928, note, Russ. & Ry. 241, 3 Camp. 265; Holloway *v.* Reg. 2 Den. C. C. 287; Mansell *v.* Reg. Dears. & B. 375, 377; Reg. *v.* Newton, 3 Car. & K. 85, 92; Keen *v.* Reg. 2 Cox C. C. 341; Ryalls *v.* Reg. 3 Cox C. C. 36, 254; Martin *v.* Reg. 3 Cox C. C. 318; O'Neill *v.* Reg. 6 Cox C. C. 495, 496; Latham *v.* Reg. 9 Cox C. C. 516, 517; Reg. *v.* Fox, 10 Cox C. C. 502; Reg. *v.* Flannigan, 32 U. C. Q. B. 593.

Alabama. — The State *v.* Greenwood, 5 Port. 474; Vasser *v.* The State, 32 Ala. 586; Young *v.* The State, 39 Ala. 357; Moore *v.* The State, 40 Ala. 49; Pomeroy *v.* The State, 40 Ala. 63; Grund *v.* The State, 40 Ala. 709; Hatch *v.* The State, 40 Ala. 718; Perry *v.* The State, 43 Ala. 21; Brazier *v.* The State, 44 Ala. 387, 390.

Arkansas. — Cole *v.* The State, 5 Eng.

§ 1069. **Concerning Form.** — The differences thus spoken of render impossible any form of the record acceptable in all the States. So no endeavor will be made to supply such a form; but, instead of this, it is proposed to present here a familiar English precedent,[1] to enlarge it at a few places by adapting it to altered facts, and to explain all as we proceed. And though it should not be blindly copied, it "might," as observed by a learned judge, "aid clerks in making up such records, if they were disposed to read it and avail themselves of it."[2] The result would be, not an absolute uniformity in our States, but an improvement among all in what will remain in a measure diverse.

§ 1070. **Form.** — It is, —

WARWICKSHIRE, } to wit. } [**Caption**]. — Be it remembered, that, at the general session of the Lord the King of oyer and terminer, holden at Warwick in and for the said county of Warwick, on, &c. before Sir Michael Foster, knight, one of the justices of the said Lord the King assigned to hold pleas before the King himself, Sir Edward Clive, knight, one of the justices of the said Lord the King, of his court of common bench, and others their fellows, justices of the said Lord the King,

318; Sandford *v.* The State, 6 Eng. 328.

Florida. — Dixon *v.* The State, 13 Fla. 631.

Illinois. — Jumpertz *v.* People, 21 Ill. 375; Schirmer *v.* People, 33 Ill. 276.

Louisiana. — The State *v.* Price, 6 La. An. 691.

Massachusetts. — Commonwealth *v.* Roby, 12 Pick. 496; Turns *v.* Commonwealth, 6 Met. 224; Green *v.* Commonwealth, 12 Allen, 155; Jennings *v.* Commonwealth, 105 Mass. 586; Commonwealth *v.* Galligan, 113 Mass. 203, 204; Crimm *v.* Commonwealth, 119 Mass. 326, 328.

Mississippi. — McQuillen *v.* The State, 8 Sm. & M. 587; Weeks *v.* The State, 31 Missis. 490.

Missouri. — McKay *v.* The State, 12 Misso. 492; Torney *v.* The State, 13 Misso. 455; The State *v.* Allen, 64 Misso. 67, 69. And see The State *v.* Freeman, 21 Misso. 481, 483.

New Jersey. — The State *v.* Gustin, 2 Southard, 744, 749; The State *v.* Price, 6 Halst. 203; Berrian *v* The State, 2 Zab. 9.

New York. — Lambert *v.* People, 7 Cow. 166; Morris *v.* People, 1 Parker C. C. 441; Peverelly *v.* People, 3 Parker C. C. 59, 61; Stephens *v.* People, 4 Parker C. C. 396; People *v.* Cramer, 5 Parker C. C. 171; People *v.* Riley, 5 Parker C. C. 401; Gardiner *v.* People, 6 Parker C. C. 155, 186; People *v.* Haekley, 24 N. Y. 74; Weed *v.* People, 31 N. Y. 465; Keefe *v.* People, 40 N. Y. 348.

North Carolina. — The State *v.* Kimbrough, 2 Dev. 431; The State *v.* Moody, 69 N. C. 529; The State *v.* Driver, 78 N. C. 423.

Pennsylvania. — Commonwealth *v.* Stoever, 1 S. & R. 480; Commonwealth *v.* Nesbit, 10 Casey, Pa. 398; Scully *v.* Commonwealth, 11 Casey, Pa. 511. See Crim. Proced. I. § 1341.

Vermont. — The State *v.* C. D., N. Chip. 284, 286; Brackett *v.* The State, 2 Tyler, 152, 155.

Virginia. — Price *v.* Commonwealth, 21 Grat. 846.

United States. — United States *v.* Plumer, 3 Clif. 1.

[1] 4 Bl. Com. Appendix.

[2] James *v.* The State, 45 Missis. 572, 581, 2 Morris State Cas. 1741, 1751, Peyton, C. J.

assigned by letters-patent of the said Lord the King, under his great seal of Great Britain, made to them the aforesaid justices and others and any two or more of them (whereof one of them the said Sir Michael Foster and Sir Edward Clive, the said Lord the King would have to be one) to inquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the moneys of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenances, oppressions, champerties, deceits, and all other misdeeds, offences, and injuries whatsoever, and also the accessories of the same, within the county aforesaid, as well within liberties as without, by whomsoever and howsoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters-patent of the said Lord the King specified, the premises and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises, according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said Lord the King, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within the county aforesaid.[1] [**Commencement**], — by the oath of Sir James Thomson, baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Philips, John Mayo, Richard Savage, William Bell, James Morris, Lawrence Hall, and Charles Carter, esquires, good and lawful men of the county aforesaid, then and there impanelled, sworn, and charged to inquire for the said Lord the King and for the body of the said county, it is presented[2] [**Indictment**], — That Peter Hunt, late of the parish of Lighthorne in the said county, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of March, in the said second year of the reign of the said Lord the King, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the said Lord the King then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that the said Peter Hunt, with a certain

[1] This is the ordinary English caption in a court of special and limited jurisdiction; but, in this country, and probably even in England, less will equally well suffice and is common, and still less where the court is a superior one. See, for the explanations, Crim. Proced. I. § 656–667. And see ante, § 53–56.

[2] This commencement is a sort of mingling of commencement and caption. It is well enough, but no better than to let each stand separate as at ante, § 53–63.

drawn sword, made of iron and steel, of the value of five shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said Samuel Collins, in and upon the left side of the belly of him the said Samuel Collins, then and there feloniously, wilfully, and of his malice aforethought did strike, thrust, stab, and penetrate; giving unto the said Samuel Collins, then and there with the sword drawn as aforesaid, in and upon the left side of the belly of him the said Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which said mortal wound he the said Samuel Collins, at the parish of Lighthorne aforesaid in the said county of Warwick, from the said fifth day of March, in the year aforesaid, until the seventh day of the same month in the same year, did languish, and languishing did live; on which said seventh day of March in the year aforesaid, the said Samuel Collins, at the parish of Lighthorne aforesaid, in the county aforesaid, of the said mortal wound did die: and so the jurors aforesaid upon their oath aforesaid do say, that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the peace of the said Lord the now King, his crown, and dignity.[1] [**Warrant of Arrest**]. — Whereupon the sheriff of the county aforesaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick, and him safely keep to answer to the felony and murder whereof he stands indicted.[2] [**Returning Indictment into Court**]. — Which said indictment the said justices of the Lord the King above named afterwards, to wit, at the delivery of the jail of the said Lord the King holden at Warwick in and for the county aforesaid, on, &c. before the right honorable William Lord Mansfield, chief justice of the said Lord the King, assigned to hold pleas before the King himself, Sir Sydney Stafford Smythe, knight, one of the barons of the exchequer of the said Lord the King, and others their fellows, justices of the said Lord the King, assigned to deliver his said jail of the county aforesaid of the prisoners therein being, by their proper hands do deliver here in court of record in form of the law to be determined.[3] [**Arraignment**]. — And afterwards, to wit, at the same delivery of the jail of the said Lord the King of his county aforesaid, on the said, &c. before the said justices of the Lord the King last above named and others their fellows aforesaid, here cometh the said Peter Hunt, under the custody of William Browne, esquire, sheriff of the county aforesaid (in whose custody in the jail of the county aforesaid, for the cause aforesaid, he had been before

[1] Comparing this indictment with ante, § 520, and chapters in Crim. Proced. II. "Homicide," we see that it has a great deal of surplusage. Still the record should contain the indictment, accurately recited, as found by the grand jury, with no improvements or corrections. And see Crim. Proced. I. § 1355.

[2] I can discover no reason to suppose that, in a case where the presence of the defendant in court appears of record, anything relating to the arrest or warrant of arrest need also appear. And see Crim. Proced. I. § 1359. In fact, it does not in all the records.

[3] With us, this matter will, in general, be different. Crim. Proced. I. § 869 *a*.

committed); being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed. And forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith [1] [The plea interposed by the defendant, or his demurrer, with the subsequent pleadings, here follows. In the present instance, it was the **General Issue of Not Guilty**; thus], — that he is not guilty thereof; and thereof for good and evil he puts himself upon the country: [2] and [**Joinder in Issue**]. — John Blencowe, esquire, clerk of the assizes for the county aforesaid [*with us*, substitute the title of the prosecuting officer] who prosecutes for the said Lord the King in this behalf, doth the like.[3] [**Petit Jury**]. — Therefore let a jury thereupon here immediately come before the said justices of the Lord the King last above mentioned, and others their fellows aforesaid, of free and lawful men of the neighborhood of the said parish of Lighthorne in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognize upon their oath, whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty: because as well the said John Blencowe, who prosecutes for the said Lord the King in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the said sheriff for this purpose impanelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who, being elected, tried, and sworn to speak the truth of and concerning the premises, upon their oath say [**Verdict**], — that the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid is above supposed against him [and that the said Peter Hunt, at the time of committing the said felony and murder, or at any time since to this time, had not nor hath any goods or chattels, lands or tenements, in the said county of Warwick, or elsewhere, to the knowledge of the said jurors [4]]. [**Anything to say, &c.**]. — And upon this it is forthwith demanded of the

[1] In one of the precedents of the record before me (Keefe *v.* People, 40 N. Y. 348), the part corresponding to so much of the text as follows the indictment down to this point is, —

And the said A [the defendant], afterwards, to wit, on, &c. at, &c. before the said justice above named, came in his own proper person, and, being brought to the bar here in his own proper person, and arraigned upon the said indictment, and having heard the said indictment read, and being asked whether he demanded a trial upon the said indictment, answered that he does require a trial thereon, and says.

[2] Crim. Proced. I. § 788, 794 *a*, 796, 797.

[3] Ib. § 801, 1354. **Subsequent Term.** — Where the trial was at a subsequent term, the following, in the record in Keefe *v.* People, supra, was here inserted: —

And afterwards, to wit, at a court of, &c. held, &c. at, &c. on, &c. comes the said A [the defendant], and the said B, esquire, District Attorney, likewise comes. Therefore, &c. [proceeding similarly to the text].

[4] Where, as with us, there are no forfeitures, the matter in these brackets does not appear.

said Peter Hunt, if he hath or knoweth anything to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him; who nothing farther saith, unless as he before had said.[1] [Sentence]. — Whereupon, all and singular the premises being seen, and by the said justices here fully understood, it is considered by the court here, that the said Peter Hunt be taken to the jail of the said Lord the King of the said county of Warwick, from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterwards his body be dissected and anatomized.[2]

§ 1071. **Manslaughter and Clergy.** — Where the verdict is for manslaughter, and clergy is allowed, the record, according to this precedent, is, —

That the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him; but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins [and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manslaughter aforesaid, or ever afterwards to this time to the knowledge of the said jurors[3]]. And immediately it is demanded of the said Peter Hunt, if he hath or knoweth anything to say wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who saith that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf. Whereupon, all and singular the premises being seen, and by the said justices here fully understood, it is considered by the court here, that the said Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the statute.

§ 1072. **Not Guilty and Discharged.** — On the verdict of not guilty, and the discharge of the prisoner by the court, the record is, —

That the said Peter Hunt is not guilty of the felony and murder in the said indictment charged against him. Whereupon, all and singular the premises being seen and fully understood by the court here, it is considered and adjudged by the said court here that the said defendant

[1] Crim. Proced. I. § 1358.

[2] This is not exactly the better form of the sentence. Certainly it is different in some of our States. Crim. Proced. I. § 1311. Imprisonment. — In Keefe *v.* People, supra, the sentence was to imprisonment for life, and it is recorded thus: —

Whereupon, all and singular the premises being seen, and by the same justice here fully understood, it is considered by the said justice that the said William Keefe, for the murder and felony aforesaid, be imprisoned in the State prison at hard labor for the term of his natural life.

[3] Not used with us, as see a note to the last section.

be discharged of the premises and do depart hence without day in this behalf.[1]

§ 1073. **Other Forms.** — The foregoing forms for the record cover the ordinary ground. One by comparing them with the elucidations in "Criminal Procedure" will see how any others, which he may require, should be; or, if still he is in doubt, he can consult the precedents cited to a previous section.[2]

[1] 1 Chit. Crim. Law, 718, 719; 4 Ib. 386, 402.
[2] Ante, § 1068.

CHAPTER XCVI.

STEPS TO PROCURE A REVERSAL.

§ 1074. **What for Chapter and how divided.** — We shall consider, in the following order, I. The Motion for a New Trial; II. Exceptions; III. The Motion for Arrest of Judgment; IV. The Writ of *Certiorari;* V. The Writ of Error.

I. *The Motion for a New Trial.*[1]

§ 1075. **Form.** — There is no exact form of words indispensable for this motion. Its terms may be, for example, —

And now comes the said A [the defendant] by X his attorney [*or*, in his own proper person[2]] and moves [*or* prays the court here] that the verdict of the jury be set aside and a new trial ordered, for the reasons that, &c. [particularizing the grounds for the motion].[3]

[1] For the direct elucidations of the various methods of obtaining new trials, see Crim. Proced. I. § 1263–1281. Incidental, as to new trial on motion, Crim. Law, I. § 992, 993, 998, 1001–1005, 1007–1009, 1026; Crim. Proced. I. § 276, 730 *a*, 887, 949 *b*, 987, 998 *a*, 999, 1016, 1038, 1065.

[2] As to whether the defendant must be personally present at the hearing of this motion, see Crim. Proced. I. § 276. The motion, in practice, appears commonly to be signed by attorney; but there can be no objection to its being signed instead by the defendant himself, or signed by him and countersigned by his attorney, and such would seem to be a reasonable method especially in the higher offences.

[3] See, for precedents of this motion: —

Georgia. — Pinkard *v.* The State, 30 Ga. 757.

Indiana. — Hamilton *v.* The State, 34 Ind. 280.

Mississippi. — Price *v.* The State, 36 Missis. 531.

Montana. — Territory *v.* Kennedy, 3 Mont. Ter. 520.

North Carolina. — The State *v.* Lipsey, 3 Dev. 485.

United States. — United States *v.* Tully, 1 Gallis. 247, 250.

§ 1076. **Affidavit.** — Where the defendant's motion rests in whole or in part on new facts, he should show them by affidavit. Its form will vary with the cases, and be obvious.[1]

§ 1077. **Order granting Motion.** — Where the court grants the motion, its order may be, —

Upon hearing counsel on both sides, it is ordered that the verdict of guilty in this case heretofore [*or*, on, &c.] rendered be set aside, and a new trial had.[2]

II. *Exceptions.*[3]

§ 1078. **How.** — The form for the exceptions, or bill of exceptions, is regulated by no technical rules. It should clearly set out the matter complained of, and, in its formal parts, conform to the ordinary practice of the particular court. As such practice differs in our States, the reader will be best served by a simple reference to precedents in the order of the States.[4]

III. *The Motion in Arrest of Judgment.*[5]

§ 1079. **How the Form.** — It being competent for the court, on seeing cause, to arrest a judgment without motion,[6] no one form

[1] For a form of affidavit, see Roseborough *v.* The State, 43 Texas, 570.

[2] Archb. Crim. Pl. & Ev. 19th ed. 197. See 4 Chit. Crim. Law, 344.

[3] Crim. Proced. I. § 1265.

[4] *Alabama.* — Judge *v.* The State, 58 Ala. 402, 403 (motion to establish bill of exceptions).

California. — People *v.* Keenan, 13 Cal. 581.

Indiana. — Jenks *v.* The State, 39 Ind. 1; Cluck *v.* The State, 40 Ind. 263, 267.

Iowa. — The State *v.* White, 47 Iowa, 555.

Kansas. — The State *v.* Bybee, 17 Kan. 462, 464.

Louisiana. — The State *v.* Cammeyer, 8 La. An. 312; The State *v.* Patten, 10 La. An. 299; The State *v.* Garvey, 28 La. An. 925; The State *v.* Cooper, 32 La. An. 1084.

Maine. — The State *v.* Smith, 67 Maine, 328.

Massachusetts. — Commonwealth *v.* Tivnon, 8 Gray, 375.

Michigan. — People *v.* McKinney, 10 Mich. 54, 60.

Montana. — Territory *v.* Drennan, 1 Mon. Ter. 41, 42.

Ohio. — Poage *v.* The State, 3 Ohio State, 229; Nichols *v.* The State, 8 Ohio State, 435; Moore *v.* The State, 12 Ohio State, 387; Stockwell *v.* The State, 27 Ohio State, 563.

Tennessee. — Ward *v.* The State, 1 Humph. 253.

Texas. — Lister *v.* The State, 3 Texas Ap. 17, 19; Dempsey *v.* The State, 3 Texas Ap. 429; Berkley *v.* The State, 4 Texas Ap. 122; Hatch *v.* The State, 8 Texas Ap. 416, 418.

Virginia. — Finn *v.* Commonwealth, 5 Rand. 701; Haynes *v.* Commonwealth, 28 Grat. 942; Johnson *v.* Commonwealth, 29 Grat. 796, 799; Kinney *v.* Commonwealth, 30 Grat. 858; Mitchell *v.* Commonwealth, 33 Grat. 845.

West Virginia. — The State *v.* Strauder, 11 W. Va. 745, 782–793; The State *v.* Hughes, 22 W. Va. 743, 744.

[5] Direct expositions, Crim. Proced. I. § 1282–1288. Incidental, Crim. Law, I. § 998–1000; Crim. Proced. I. § 42, 269, 277, 424, 443, 470, 813, 887–889, 1038, 1293, 1368, 1370; Stat. Crimes, § 347 *a*.

[6] Crim. Proced. I. § 1283.

for the motion can be or is indispensable. Even it has been permitted to be made orally and informally by the defendant when called up for sentence.[1] But the better and common course is to present it, with its reasons, in writing; as, for example, —

And now, after verdict against the said A and before sentence, comes the said A in his own proper person [*or*, by X his attorney], and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing; to wit [specifying them], and because no judgment against him the said A can be lawfully rendered on said record.[2]

IV. *The Writ of Certiorari.*[3]

§ 1080. **In General.** — The practice, as to the writ of *certiorari*, is explained in various books of practice, so that there is no necessity of encumbering these pages therewith.

§ 1081. **Removing for Trial.** — In England and a very few of our States, this proceeding is employed for the removing of indictments from the lower courts for trial in the higher.[4] Were such use of the writ within the scope of the present chapter, a simple reference, as now, to places where it and its attendant forms may be found,[5] would suffice, so seldom is it required by American lawyers.

§ 1082. **After Conviction — And Special Cases.** — After conviction and sentence, after a judgment in *habeas corpus*, between conviction and sentence, and in other circumstances similar to these, this writ is often employed. To set out the proceedings in full in these various cases would require considerable

[1] Rex *v.* Horne, 20 Howell St. Tr. 651, 764, 773. And see Rex *v.* Waddington, 1 East, 143, 146.

[2] For precedents, see —

Alabama. — Morgan *v.* The State, 48 Ala. 65.

Florida. — Dixon *v.* The State, 13 Fla. 631.

Georgia. — The State *v.* Cuthbert, T U. P. Charl. 13; Long *v.* The State, 12 Ga. 293, 310; Jordan *v.* The State, 60 Ga. 656.

Maine. — The State *v.* Murphy, 72 Maine, 433.

Massachusetts. — Commonwealth *v.* Hardy, 2 Mass. 303; Commonwealth *v.* Galligan, 113 Mass. 203, 205.

Texas. — Quitzow *v.* The State, 1 Texas Ap. 47, 51; Ware *v.* The State, 2 Texas Ap. 547.

[3] For the direct expositions, see Crim. Proced. I. § 1375–1381. Incidental, Ib. § 1364.

[4] Crim. Proced. I. § 1377.

[5] Archb. Crim. Pl. & Ev. 19th ed. 101–108; 4 Chit. Crim. Law, 246–253; 6 Went. Pl. 428; 2 Gude Crown Pract. 187, 188; Rex *v.* Dickenson, 1 Saund. 134; People *v.* Rulloff, 3 Parker C. C. 401, 408.

space, and less would be of little service to the practitioner. So a reference to places where they may be found must suffice.[1]

V. *The Writ of Error.*[2]

§ 1083. **Diversities.** — The practice on writs of error is, in minor particulars, not quite identical in our States; admonishing the practitioner to look into the course of his own court, the rules of court, and the statutes, and take them for his guide where they differ from what is set down in a book of practice. Subject to this modification, the principal steps are, —

§ 1084. **Attorney-General's Fiat.** — In England, the first step is to apply to the attorney-general for his fiat. If he assents, the form is for him to write after the words of the *præcipe* "Let this writ issue," and sign his name.[3] It is believed that in none of our States at present is the assent of the prosecuting or any other non-judicial officer essential.[4] But —

§ 1085. **Petition for Writ — Application to Judge.** — In some of the States, or in some circumstances, there is a petition to the court to grant the writ of error, or an application to a judge for leave to bring it, — the forms for which are simple and obvious.[5]

[1] 2 Gude Crown Pract. 39–41, 189–191, 567, 568, 627; 4 Chit. Crim. Law, 124, 125, 196, 244, 245, 253–263, 419; 6 Went. Pl. 24; Rex *v.* Hambden, Trem. P. C. 307; Rex *v.* Lever, Trem. P. C. 320, 321; Rex *v.* Hoopes, Trem. P. C. 558; Rex *v.* Read, Trem. P. C. 559.

New York. — People *v.* Van Santvoord, 9 Cow. 655; People *v.* Tompkins, 1 Parker C. C. 224; People *v.* Thurston, 2 Parker C. C. 49; McGuire *v.* People, 2 Parker C. C. 148; People *v.* Benjamin, 2 Parker C. C. 201; People *v.* Cavanagh, 2 Parker C. C. 650; People *v.* Carroll, 3 Parker C. C. 73; People *v.* Bogart, 3 Parker C. C. 143; People *v.* Adler, 3 Parker C. C. 249; People *v.* Butler, 3 Parker C. C. 377; People *v.* Cunningham, 3 Parker C. C. 531; People *v.* Page, 3 Parker C. C. 600; People *v.* McCormack, 4 Parker C. C. 9; O'Leary *v.* People, 4 Parker C. C. 187; Stephens *v.* People, 4 Parker C. C. 396; People *v.* Riley, 5 Parker C. C. 401; People *v.* Nash, 5 Parker C. C. 473; People *v.* Gardiner, 6 Parker C. C. 143.

Vermont. — Brackett *v.* The State, 2 Tyler, 152.

[2] For the direct expositions, see Crim. Proced. I. § 1361–1374. Incidental, Crim. Law, I. § 1024, 1026; Crim. Proced. I. § 277, 443, 1026, 1039, 1267.

[3] For the proceedings, see Archb. Crim. Pl. & Ev. 19th ed. 206, 207; 4 Chit. Crim. Law, 415, 416. Archb. New Crim. Proced. 199, states: "Obtain a certificate from counsel that there is error in the record; and, upon producing that, and a verified copy of the indictment or record, to the attorney-general, he usually grants his fiat." For a form of memorial to the attorney-general praying for his fiat, see Dugdale *v.* Reg. Dears. 64, 78, note.

[4] Crim. Proced. I. § 1362. There have been, and perhaps may be still, in some of our States, remnants of this English practice; as see, for example, Lavett *v.* People, 7 Cow. 339; Commonwealth *v.* Capp, 12 Wright, Pa. 53; The State *v.* Fields, Mart. & Yerg. 137.

[5] For forms of petition, see 2 Morris St.

§ 1086. **Form of Writ.** — The writ, admitting of minor variations to suit the particular case, is —

The People of the State of, &c. [*or* The State of, &c. *or* The Commonwealth of, &c.][1] to our justices of, &c. Greeting. Because in the record and proceedings, and also in the giving of judgment, in a certain indictment against A for murder [*or*, &c. according to the fact], whereof by a certain jury of the county before you impanelled thereupon between us and the said A he was convicted,[2] as it is said, manifest error has intervened, to the great damage of the said A, as by his complaint we are informed; we, being willing that the error, if any there be, should be in due manner corrected, and full and speedy justice done to the said A in this behalf, do command you that, if judgment be thereupon given, then you send to the justices of our court of, &c. distinctly and openly under your seal,[3] the record and proceedings aforesaid, with all things concerning the same, and this writ, so that we may have them before said court on, &c. [stating the return day], that, the said record and proceedings being inspected, we may cause to be further done thereupon, for correcting the said error, what of right and of law[4] ought to be done. Witness, &c. [as in other writs].[5]

Cas. 1838; The State *v.* Anderson, 3 Sm. & M. 751. Where a judge allows a writ of error, he generally does it by an indorsement on the writ itself.

[1] In most of the New York precedents, the expression is "The People of the State of New York by the grace of God free and independent."

[2] I suppose that the sole purpose of this description of the record is identification, therefore that what is minute enough for such object will suffice. I have here followed in substance the form in Mansell *v.* Reg. 8 Ellis & B. 54, compared with that in 2 Gude Crown Pract. 207, and various others. The description in some of the precedents descends further into the particulars. In People *v.* Cyphers, 5 Parker C. C. 666, and some others, it is shorter.

[3] In most of the English precedents, and in ours in proper circumstances, the expression here is "under your seals or the seal of one of you."

[4] The English form here, followed with the proper substitution of names in some of our States, is "what of right and according to the law and custom of our realm of England."

[5] The precedents, from the earliest times, are alike in their entire substance, but there are slight verbal differences. This form is the result of a comparison of considerable numbers. For precedents, see Archb. Crim. Pl. & Ev. 19th ed. 208; 4 Chit. Crim. Law, 416–420, 434; 2 Gude Crown Pract. 207; Rex *v.* Fanshaw, Trem. P. C. 199; Rex *v.* Stone, Trem. P. C. 288; Rex *v.* Holles, Trem. P. C. 294, 305; Rex *v.* Hambden, Trem. P. C. 307, 313; Rex *v.* Walcot, 9 Howell St. Tr. 519, 560; Rex *v.* Wilkes, 19 Howell St. Tr. 1075, 1086, 4 Bur. 2527, 2535; Rex *v.* Perin, 2 Saund. 389; Mansell *v.* Reg. 8 Ellis & B. 54; Leverson *v.* Reg. Law Rep. 4 Q. B. 394, 11 Cox C. C. 286 (in substance); Wright *v.* Reg. 2 Cox C. C. 91; Duval *v.* Reg. 14 L. C. 52; Whelan *v.* Reg. 28 U. C. Q. B. 2; Cornwall *v.* Reg. 33 U. C. Q. B. 106.

Maryland. — The State *v.* Boyle, 25 Md. 509.

Mississippi. — 2 Morris St. Cas. 1840.

New York. — Yates *v.* People, 6 Johns. 337; Lake *v.* People, 1 Parker C. C. 495; Peverelly *v.* People, 3 Parker C. C. 59; People *v.* Thoms, 3 Parker C. C. 256 (in behalf of the People); Coats *v.* People, 4 Parker C. C. 662; Lowenberg *v.* People, 5 Parker C. C. 414; People *v.* Cyphers, 5 Parker C. C. 666.

United States. — United States *v.* Plumer, 3 Clif. 1.

§ 1087. **Coram Nobis.** — Where, as in the practice which prevailed in England when we derived thence our common law, the writ of error issues out of chancery, there is propriety in its commanding a common-law court to review its own judgment; yet there can be none in a tribunal's addressing the like command to itself. Still it is with us common in civil causes for a court of record to issue a writ of error to itself, called a writ of error *coram nobis*, or *coram vobis*, or a writ in the nature of such writ, commonly or always for the correction of some error of fact; and this practice appears to extend even to criminal cases.[1] As to the form, Tidd observes of the writ as given in the last section, that it "consists of two parts; first, a *certiorari* to remove the record, and, secondly, a commission to examine it. But," he continues, "in a writ of error *coram nobis* or *vobis*, the *certiorari* part, being unnecessary, is omitted."[2] The writ, therefore, is easily constructed from the form in the last section.[3]

§ 1088. **Return.** — The return is ordinarily indorsed on the writ itself, with the record in question attached thereto, and the whole transmitted to the higher court. Its form will be more or

[1] Crim. Proced. I. § 1369; Webster *v.* Commonwealth, 5 Cush. 386; Green *v.* Commonwealth, 12 Allen, 155.

[2] 2 Tidd Pract. 8th ed. 1198.

[3] For forms in civil cases, see Smith *v.* Kingsley, 19 Wend. 620; Camp *v.* Bennett, 16 Wend. 48, 50. According to a former practice in England, now apparently discontinued, but probably permissible still, the aggrieved person might, instead of procuring his writ of error addressed to the lower tribunal, first remove the record by *certiorari* into the King's Bench, then bring his writ of error *coram nobis* upon such removed record. Reg. *v.* Foxby, 1 Salk. 266, 6 Mod. 178, Holt, 274; Archb. New Crim. Proced. 200; 2 Hale P. C. 210. The proceeding appears in full in Rex *v.* Hambden, Trem. P. C. 307. The writ of error *coram nobis* therein is, —

"To our Justices assigned to hold Pleas before us, Greeting. Because in the record and process, and also in the giving of judgment, of a certain indictment before our justices assigned to deliver our jail of Newgate of the prisoners being therein, against A of the parish, &c. in the county of Middlesex, gentleman, for high treasons against the person of the lord Charles the Second, late king of England, our most dear brother, whereof before them he lately was attainted, as it is said, manifest error hath intervened to the great damage of the said A, as we have understood from his complaint; we, willing that the error, if any there hath been, in the due manner be corrected, and that full and speedy justice be done to the said A in this behalf, command you, that, if judgment be thereupon given, then that, inspecting and examining the record and process aforesaid, which we have caused to come before us for certain causes, and which before us now remain, as it is said, we may further cause to be done thereupon for correcting the error that which of right and according to the law and custom of our kingdom of England shall be to be done. Witness ourself at Westminster, the fourteenth day of May, in the second year of our reign."

This proceeding, if it does not contradict what the books sometimes say is the rule, that error *coram nobis* lies only for error of fact, shows it not to be without exception.

less modified by the circumstances, and there is nothing in it demanding special consideration.[1]

§ 1089. **Diminution of Record and Certiorari.** — A party not satisfied with the record returned, and alleging diminution of record, may in a proper case have a writ of *certiorari* to supply the defect.[2] In one instance the form was, —

The People, &c. We being willing, for certain causes, to be certified of the exact words and form of the verdict rendered against A in your said court, upon an indictment against him, which said indictment and the judgment thereon have been certified to our Supreme Court in answer to the writ of error issued in behalf of said defendant, do command you that, having searched the records of said Court of Sessions, the exact words and form of the verdict rendered against said A, and whether that is the only verdict rendered against him in said court, you certify to our justices of our Supreme Court of Judicature, without delay, at the Capitol, in the city of Albany, fully and entirely as the same remains on record in your said court, and this writ. Witness, &c.[3]

§ 1090. **Assignment of Errors.** — The usual form is, in substance, —

And now comes into court here the said A, in his own proper person [*or*, by X his attorney], and says, that, in the record and proceedings aforesaid, and also in the rendering of the judgment aforesaid, there is manifest error in this, that the indictment aforesaid and the matter therein contained are not sufficient in law to warrant the judgment against him now given, or to convict him of the, &c. [say what] aforesaid. There is also error in this, that, &c. [proceeding to particularize]. And [if new matter is introduced, not otherwise] this he is ready to verify. And the said A prays that the judgment aforesaid, for the errors aforesaid, may be reversed and annulled and absolutely held for nothing, and that he may be restored to all things which he has lost by reason of the premises aforesaid.[4]

[1] Forms appear at many places already cited. For the common English form, see Archb. Crim. Pl. & Ev. 19th ed. 209, 210; 2 Gude Crown Pract. 208; 4 Chit. Crim. Law, 417, 420; Rex *v.* Stone, Trem. P. C. 288. American, Lowenberg *v.* People, 5 Parker C. C. 414, 416; Yates *v.* People, 6 Johns. 337, 339.

[2] Crim. Proced. I. § 1379.

[3] O'Leary *v.* People, 4 Parker C. C. 187, 189. But see, as to New York, Hayen *v.* People, 3 Parker C. C. 175. For a form of motion, suggesting diminution, see Crimm *v.* Commonwealth, 119 Mass. 326, 328.

[4] For forms see, besides various other places cited in the preceding sections, Archb. Crim. Pl. & Ev. 19th ed. 211; 2 Gude Crown Pract. 209, 210; 4 Chit. Crim. Law, 220-226; Rex *v.* Stone, Trem. P. C. 288; Rex *v.* Doughty, Trem. P. C. 285, 286; Rex *v.* Hambden, Trem. P. C. 307; Rex *v.* Wilkes, 19 Howell St. Tr. 1075, 1086, 4 Bur. 2527, 2536; Williams *v.* Reg. 1 Cox C. C. 179; Campbell *v.* Reg. 11 Q. B. 799, 800, 1 Cox C. C. 269; Martin *v.* Reg. 3 Cox C. C. 318, 325; O'Brien *v.* Reg. 3 Cox C. C. 360, 373; O'Neill *v.* Reg. 6 Cox C. C. 495, 498;

§ 1091. **Other Forms,** — not differing from those used in civil causes, or not difficult of construction, might be sometimes convenient; but, at the places referred to in connection with those already given, and in the books of civil practice, they can be readily found. Nor, though other topics could be added not quite unprofitably, is there any urgent occasion for them. So it is best that this chapter and the volume here close.

Whelan *v.* Reg. 28 U. C. Q. B. 2; Cornwall *v.* Reg. 33 U. C. Q. B. 106.

Delaware. — Gray *v.* The State, 2 Harring. Del. 76, 77.

Massachusetts. — Brien *v.* Commonwealth, 5 Met. 508; Turns *v.* Commonwealth, 6 Met. 224; Jeffries *v.* Commonwealth, 12 Allen, 145; Crimm *v.* Commonwealth, 119 Mass. 326, 327.

Mississippi. — Byrd *v.* The State, 1 How. Missis. 247; King *v.* The State, 5 How. Missis. 730.

New Jersey. — Donnelly *v.* The State, 2 Dutcher, 463, 475.

New York. — Hayen *v.* People, 3 Parker C. C. 175.

Texas. — Harris *v.* The State, 1 Texas Ap. 74, 77.

INDEXES.

INDEX TO THE CASES CITED IN THIS VOLUME.

NOTE. — Where the plaintiff is the king or queen (Rex or Reg.), the State, Commonwealth, People, United States, or the like, the defendant's name is put first. The plaintiff's is first in the other cases.

INDEX TO THE FORMS

IN THIS VOLUME.

NOTE. — The index to the rest of the matter in the volume is merged in the General Index, next following, embracing the entire series.

The figures denote the sections.

GENERAL INDEX TO THE SERIES

OF SIX VOLUMES.

SCOPE. — This index shows simply where to look for a thing. The further search is made easy by the minute divisions of the subjects and the section headings.

EDITIONS. — In the gradual construction of this series, there were some changes of matter from one work or volume to another, whereby renumberings of the sections became necessary. This index, therefore, is not adapted to any edition of Criminal Law prior to the fifth, nor is it adapted to the first of Criminal Procedure. And there were a few variations of numberings in the editions still later, and in Statutory Crimes in the second edition, and especially there was much added to all; so that not every reference in this index will be answered in any edition except the last.

ABBREVIATIONS. — CL. Criminal Law; CP. Criminal Procedure; SC. Statutory Crimes; DF. Directions and Forms; i. Volume One; ii. Volume Two. The figures denote the sections.

University Press, Cambridge: John Wilson and Son.